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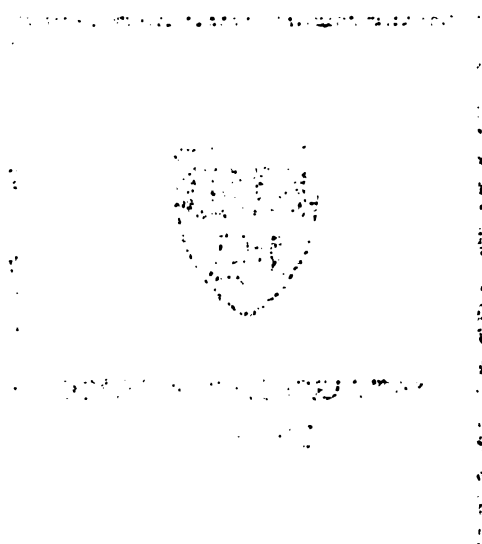


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**REPORTS OF CASES**

**ARGUED AND DECIDED IN THE**

**[SUPREME COURT] OF GEORGIA**

**AT THE**

**OCTOBER TERM, 1890, AND MARCH TERM, 1891.**

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**VOLUME LXXXVI.**

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**PEEPLES AND STEVENS, REPORTERS.**

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DURING THE PERIOD OF THESE REPORTS.

HON. L. E. BLECKLEY, Chief Justice.....	Atlanta.
HON. M. H. BLANDFORD, Associate Justice.....	Columbus.
HON. T. J. SIMMONS, Associate Justice.....	Atlanta.
HON. SAMUEL LUMPKIN,* Associate Justice.....	Lexington.
H. C. PEEPLES, Reporter.....	Atlanta.
G. W. STEVENS, Assistant Reporter.....	Atlanta.
Z. D. HARRISON, Clerk.....	Atlanta.

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CLARKE COUNTY.....	HON. HOWELL COBB.....	Athens.
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FLOYD COUNTY.....	HON. MAX MEYERHARDT.....	Rome.
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SAVANNAH.....	HON. WILLIAM D. HARDEN.....	Savannah.

\*Successor to Justice BLANDFORD, whose term expired December 31, 1890.

†Successor to Judge SMITH, who died November 25, 1890.

‡Successor to Judge GUSTIN, who resigned January 4th, 1890.

§Successor to Judge HINES, whose term expired December 31, 1890.

¶Successor to Judge LUMPKIN, who was elected to the Supreme bench.

‡Successor to Judge HARRIS, whose term expired December 31, 1890.

#### NOTE.

The head-notes of the decisions delivered by Chief Justice BLECKLEY and Justice LUMPKIN were made by them; the others were made by the reporters, excepting those in the cases extending from page 540 to page 574, inclusive, and in the cases where no further opinion appears (no further opinion having been filed).

Justice LUMPKIN was providentially prevented from presiding in the cases decided by two Justices.

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# CASES DECIDED

AT THE

## OCTOBER TERM, 1890.

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SILVEY, administrator, v. McCool, administratrix.

1. Where a conveyance or a bond to convey designates a public highway as one of the boundaries of the tract, the instrument will generally be construed as comprehending the highway itself to the centre or middle thread.
2. No fraud being charged upon the vendor in pointing out the limits or describing the premises, nor any reason shown why the vendee could not, or did not, see for himself where the public road was or how it was related to the land for which he bargained, the same being enclosed by a fence and bounded on every side by a road or alley outside of the fence, there was no cause for reducing the price on account of the location of the road unless there was mutual mistake.
3. The plea alleging mutual mistake, upon which the case was tried, was wide enough to admit all the evidence necessary to show the difference, if any, between the tract bargained for and the one obtained, and their difference in value, if any; but the evidence adduced being silent as to any difference in value, the jury had no basis on which to allow any deduction whatever from the stipulated price.
4. The rate of interest specified in the contract being eight per cent. per annum, that rate ran after maturity as well as before.
5. Where a deed giving a description of the premises was used as the basis of a survey, and the witnesses so testify, the deed is admissible to enable the jury to understand and apply the oral evidence.

October 8, 1890.

Boundaries. Construction. Vendor and purchaser. Mistake. Evidence. Interest. Deeds. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term, 1889.

Reported in the decision.

v 86-1

T. P. WESTMORELAND, for plaintiff in error.

R. J. JORDAN, L. W. THOMAS and REID & STEWART,  
*contra*.

BLECKLEY, Chief Justice.

1. The land sold by McCool to Bomar, as described in the bond for titles, was "all that tract or parcel of land situated, lying and being on the northwest side of the Macon R. R. and Newnan wagon road, running back northwest from a stake corner on said roads four hundred and twenty feet; thence west of south eight hundred and twenty-five feet to the original south line; thence east along the land line six hundred and ninety feet to the Newnan road; thence north of east along the road three hundred and fifty-five feet to the beginning corner, containing about seven and one half acres off of land lot 119, with all the rights, members and appurtenances of said lot of land in any way appertaining and belonging." This action is founded upon notes given for the purchase money. The tract was surrounded at the time of the sale, and still is, by fences, and by roads or alleys outside of the fences. But some of the evidence indicates that to obtain the measurement in feet expressed in the bond, the lines would be prolonged beyond the fence on the Newnan road so as to take in some of that road, as now used, and as it was used at the time of the sale and for many years previously. Other evidence indicates that the whole tract has been, or can be, measured off so as not to embrace any portion of the Newnan road proper, although that road, as used by the public, encroaches upon it. Let it be conceded, however, that the Newnan road occupies some of the front of the tract. It is certain that the measurement in feet requisite to conform to the bond would not extend beyond the middle thread of that road, except a little at or near one corner. This being so, and there being no evidence that the public

owns, or ever has claimed, more than an easement in the land occupied by this public road, the terms of the bond might well be construed to cover the fee of the road-bed up to the centre line, and thus, that there is no substantial variance between the actual tract as it has been measured out and the description of it contained in the bond. Where land is bounded by a highway, if the public only have a right of way over the land and not a title to the soil, and the land is described as bounding on or running along the highway, or the like, the line is the centre of the highway; and in all cases of doubt, the presumption is in favor of the boundary being in the centre of the road. 2 Am. & Eng. Encl. of L. 507; 3 Washburn on Real Property (5th ed.), 448 *et seq.* We rather think that the proper construction of the bond for titles in the present case is, that it embraces within its terms the fee over one half the breadth of the Newnan road on which it fronts, and there is no evidence in the record either showing how much the easement of the public lessens the value of the tract, if anything, or that the tract would be more valuable if the road were elsewhere. Neither is there any evidence tending to show that Bomar did not know that the road was in fact in the same situation relatively to the fences and the general body of the lot as it was, and as it still is. He saw, or could have seen, the exact location of the property. If he took possession of it, he must have accepted it in the state in which it then was, and still is. He has not been evicted from any part of it nor have his heirs or administrator, so far as appears, been subjected to any eviction since his death. It seems to us, therefore, that this litigation is really about nothing. It is not shown that the public has required any building to be removed, or any tree to be cut down or flower destroyed, or that the public has asserted any right to do this or to have it done. Indeed, there is no

evidence whatever as to the public right except the location and use of the Newnan road outside of the land as actually enclosed by fence.

2. The pleas stricken made no charge of actual fraud, and showed no reason why Bomar was not as well aware of the location of the Newnan road, and the situation of the property relatively to that road, as McCool; or how he was, or could be, misled as to whether the trees and flowers were in the road or out of it. It is not alleged that he was absent, or that for any other reason he failed or omitted to inspect the premises. Nothing is suggested to relieve him from the duty of assuring himself whether some of the land he was bargaining for lay in the road or out of it. He could see for himself how far it was from the centre of the road, as used, to the fence. And, indeed, the boundaries of the lot on every side were open and visible to his inspection. At least, nothing to the contrary is set up in these pleas.

3. The plea of mutual mistake, as left standing by the court, afforded ample room for admitting all evidence which any plea could have furnished room for to show how much less the tract obtained was worth than the one bargained for, if, indeed, there was any difference between the two. But no evidence on this subject was adduced. How, then, could the jury rightfully make any deduction from the purchase money notes on account of mistake? The defendant did not ask for a rescission, but only for a reduction or apportionment of the price. Yet, no evidence whatever was brought in by which to ascertain the amount which ought to be deducted. If, by reason of mistake, there was a false tract accepted in lieu of a true one purchased, the difference between the value of the two, apportioning such value by the purchase price, would be the deduction which ought to be made. *Smith v. Kirkpatrick*, 79 Ga. 410. The jury made a small deduction from the notes, but

how they arrived at the amount we do not know. As the case stood before them under the evidence, we think their finding was, to this extent, an error against the plaintiff below. If we could order a new trial in his favor, we should be inclined to do so; but this is not in our power, as he does not complain.

4. The allowance of interest at eight per cent. was correct, that being the contract rate expressed in the notes.

5. There was no error in admitting the deed from Gamage to McCool, that deed having been used by the surveyors in running the lines, and they referring to it in their testimony as a standard by which they were guided in making the survey. This testimony, or a part of it, was introduced by the defendant, and the deed was pertinent to enable the jury fully to understand that part of the oral evidence.

There was no error in refusing a new trial.

*Judgment affirmed.*

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CRAWFORD v. THE GEORGIA PACIFIC RAILWAY COMPANY.

1. Before announcing ready for trial the plaintiff should be prepared with evidence to maintain the action, not merely to change the burden of proof. Where known witnesses to material facts alleged in the declaration are absent, and there has not been time since discovering them to take their testimony by interrogatories, and the plaintiff voluntarily goes to trial instead of applying for a continuance, the absence of these witnesses, though afterwards fully accounted for, will be no cause for a new trial.
2. That a witness for the losing party testified at the trial in a way to be misunderstood is no cause for a new trial if the misunderstanding could have been prevented by due diligence in consulting with the witness and conducting his examination.
3. As to an alleged mistake by one of the witnesses in behalf of the prevailing party, this case is distinguishable from *Scofield v. State*, 54 Ga. 636.
4. Where the declaration sets forth several particulars in respect to which it alleges negligence, the court in charging the jury may confine its instructions to those particulars on which the plaintiff

insists at the trial and upon which, according to the evidence, the merits of the case depend, and may treat the others as not involved in the controversy. The charge given was full and correct.

5. Expert evidence of blacksmiths or other workers in metal is not indispensable in order to show that the "spring rail" of a railroad switch, the breaking of which caused the accident, was or appeared to be sound and made of fit material. The jury may regard other evidence as sufficient to vindicate the company's diligence.

October 8, 1890.

Practice. Witness. New trial. Negligence. Charge of court. Railroads. Before Judge VAN EPPS. City court of Atlanta. December term, 1889.

Action by Eliza Crawford, under the act of October 27, 1887, for the homicide of her son; and verdict for the defendant. The plaintiff excepted to the overruling of her motion for a new trial.

HOKE & BURTON SMITH, for plaintiff.

JACKSON & JACKSON, for defendant.

BLECKLEY, Chief Justice.

1. The main ground of the motion for a new trial relied upon in the argument was the ground relating to so-called newly discovered evidence. We see no reason to doubt that, by the use of full diligence, this evidence might have been obtained in time for the trial. It related to matters affirmed to be thus and so in the plaintiff's declaration, and the evidence to prove that the facts were as alleged, and to reply to the evidence which might be adduced by the defendant tending to show the contrary, should have been discovered before the action was brought. A plaintiff should not bring an action and rely upon the chances for discovering evidence afterwards to support it. Moreover, these witnesses had been discovered before the trial, and if there had not been time to take their testimony by interrogatories, and they themselves were not in attendance when the case was called, the plaintiff should have applied for a continuance, and not gone to trial taking

the chances for a recovery without these witnesses, and, having lost, obtain a new trial now because they were not present. This would be to accept the results of a first trial if they were favorable, and reject them if they were unfavorable. It is said that the plaintiff was not bound to anticipate that the *prima facie* case made by simply showing that her son was killed without his fault by the running of the cars, would be met and overcome by the defendant, and therefore that there was no need to be prepared with more than *prima facie* evidence before announcing ready for trial. This theory cannot be correct. Otherwise a new trial would have to be granted whenever the plaintiff has gone far enough to change the burden of proof, should he lose his case and then show on a motion for a new trial that he could answer the defendant's evidence if allowed another opportunity. A plaintiff, to be really ready for trial, must be prepared, not only to cast the *onus*, but to keep up the preponderance of the evidence until the case is finally submitted to the jury. The declaration is not only to be proved, but its truth is to be maintained until the jury can set their seal upon it by a verdict.

2. It is said that one of the plaintiff's witnesses was misunderstood, and that his evidence was not put before the jury so as to convey the sense and meaning which he intended. Proper diligence in the preparation of the cause and in consulting with this witness would doubtless have prepared counsel to understand what the witness would testify, and to conduct the examination in a way to have the jury also understand it correctly. If there had not been sufficient opportunity to consult with the witness before his examination, time, on a proper showing to the court, could have been allowed for that purpose, even pending the trial.

3. The defendant's witness, Strickland, does not depose in his affidavit now produced by the plaintiff that



he made a mistake in his testimony. He puts the matter conditionally, and there is no such evidence that the condition existed as there was in *Scofield v. The State*, 54 Ga. 635, that the witness had made a material mistake. In this instance, if there was a mistake as to the speed of the train or the point at which the grade of the track changed, the use of proper diligence to prepare for trial would have secured the evidence to correct or contradict the witness before the trial began. Here the scene of the occurrence was definite, and the plaintiff knew just where to inquire for witnesses and where all the material facts involved in the transaction concentrated. The local knowledge needed was attainable by a timely examination of the scene of the accident.

4. The charge of the court, read in the light of the evidence, was full and correct. It covered all the material questions in the case, even the request to charge which was declined, in so far as that request was legal and appropriate. It states that the three points of negligence enumerated were all that were insisted upon, and this we are to consider as true, as the judge nowhere certifies to the contrary. It is not incumbent on the court to charge upon all the negligence alleged in the declaration, but only so much of it as the evidence applies to and as the plaintiff insists upon at the trial. There was absolutely no testimony to uphold the allegation that a "Y" is improper or less safe than a side-ling. All the evidence upon the subject was directly to the contrary.

5. The suggestion that expert evidence from blacksmiths or workers in metal is necessary to clear the road of negligence, the accident having been caused by the breaking of a spring rail, assumes that, as matter of law, the jury had no right to be satisfied with any other evidence. We think there is no such law as this.

Whether a piece of iron, steel or other metal forming part of a railway track is sound or unsound, and whether it is apparently suited to the purpose for which it is used, is a question on which any practical person of experience in railroading can give an opinion in connection with the facts on which the opinion is founded. Indeed, the competency of the evidence seems not to have been disputed; and if it was competent, we think the jury, if they believed it trustworthy, had a right to consider it and base their verdict upon it. We discover no lack of evidence to authorize the jury to reach the conclusion at which they arrived. There was no error in denying the motion for a new trial.

*Judgment affirmed.*

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CLARK *et al.* v. FEE.

86	9
111	88

1. In a suit on an account, an interrogatory to the plaintiff requesting him to "examine this account and state whether the same is just, due, correct and unpaid," the account being exhibited, was allowable in the discretion of the trial court, over the objection that it was leading and intended to elicit a general answer that could be nothing more than a conclusion of law.
2. The evidence required the verdict.
3. The evidence being that the goods in question were ordered from the plaintiff by the defendants through a broker, purchased through the broker at a stated sum, received by the defendants upon an invoice furnished by the plaintiff, and sold by the defendants, a charge that if the goods were sold and delivered by the plaintiff to the defendants, and the charges therefor were reasonable and just, the jury should consider that the account has been established, and that the plaintiff is entitled to recover, was more favorable to the defendants than the evidence warranted.
4. An appeal is frivolous and intended for delay only when it is entirely without merit and entered merely to postpone the creditor in the collection of his debt.
5. This court, from the whole record, being forced to the conclusion that the case was brought here for delay only, 10 per cent. damages upon the principal sum recovered are assessed.

October 8, 1890.

Evidence. Interrogatories. Verdict. Accounts. Appeals. Practice. Damages. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term, 1889.

Fee sued A. B. Clark and A. B. Clark & Co. in a magistrate's court, on an account for ten barrels of apples at \$5.25 a barrel. A judgment was rendered for plaintiff, and defendants appealed to the superior court. The evidence for plaintiff in that court, briefly stated, was as follows: Upon April 5, 1887, one Hill was engaged as a broker in buying and selling produce on commission in New York. Previous to that day he had sent out market quotations upon apples, but his quotations were always subject to the fluctuations of the market. Upon that day, he received a telegram from defendants; he visited the market and found apples variously priced at from \$4 to \$6 per barrel. Plaintiff showed him some at \$5.25 per barrel, which were fine, hard, red stock, the best in the market. They were thoroughly examined by Hill before purchasing, and he considered them a good trade at the price named, and he was thoroughly familiar with the apple market, and he regarded them the best to ship to defendants. He bought at the lowest market price that day. The apples were assorted by plaintiff before shipment or packing, and were shipped the same day in good order. They have not been paid for. Plaintiff only knew Hill as a broker. Both plaintiff and Hill testified that the account sued on was just, due, correct and unpaid. Before the beginning of the action, plaintiff's attorney called on defendants about the matter, and Clark admitted to him that he gave the order to Hill for the apples and received and sold them. He also showed the attorney a postal card from Hill showing the quotation of apples from \$4 to \$6, and complained that he expected them laid down at the lowest figure

quoted by Hill, and requested the attorney to wait until he could correspond with plaintiff and see if an adjustment could not be reached. This the attorney did, but the correspondence came to nothing. In the interview Clark said that, shortly after the order was given, the apples arrived with an invoice corresponding to the bill sued on; that they were in bad condition and decaying, and to prevent their spoiling he sold them to the best advantage possible, realizing \$37.50, and thereupon notified plaintiff of the condition of affairs and offered to send him the money. He also offered to pay the attorney at the time of the interview \$37.50 in full, but the attorney would not accept it. When the case was tried in the justice's court, Clark was present and did not testify, though the attorney then testified substantially as above. Clark's principal objection to the apples was the price. The defendants offered no evidence.

The jury found for the plaintiff \$52.50, with interest from April 5, 1887, to the date of the verdict, and further found that the appeal was frivolous and made for delay only; and a judgment was entered for the principal and interest found, twenty per cent. damages and costs of suit. The defendants moved for a new trial on the grounds stated in the opinion. To the overruling of this motion exceptions were taken.

HOOPER ALEXANDER, for plaintiffs in error.

E. A. ANGIER, by brief, *contra*.

BLANDFORD, Justice.

A verdict having been rendered in the court below against the defendant, he moved the court for a new trial upon several grounds, which was refused by the court.

The first ground of error assigned is, that the court admitted in evidence the answer of Fee to a certain in-

terrogatory, the interrogatory being: "Examine this account" (the account being stated) "and state whether the same is just, due, correct and unpaid." The objection made was, that the interrogatory was leading, and intended to elicit a general answer that could be nothing more than a conclusion of law. We do not think there is anything in this ground. The account being exhibited to the witness, the question was allowable in the discretion of the trial court.

The second ground of the motion is almost identical with the first.

The third ground of the motion is, that the verdict is contrary to the evidence, and without evidence to support it. An examination of the testimony in the case shows, not only that the verdict was not without evidence to support it, but that the evidence was so strong as to require the verdict.

The fifth ground of the motion complains of error because the court charged the jury: "If you believe from the evidence that the goods were sold and delivered by the plaintiff to the defendant, and the charges therefor are reasonable and just, you should consider that the account has been established, and that the plaintiff is entitled to recover." This charge was more favorable to the plaintiff in error than the evidence warranted, the evidence being that the goods were ordered from the defendant in error by the plaintiff in error through a broker, and were purchased through the broker at a stated sum; were received by the plaintiff in error upon an invoice furnished by the defendant in error, and the same were sold by the plaintiff in error.

It is further alleged that the court erred in charging the jury: "An appeal is frivolous and intended for delay only when the appeal is entirely without merit and entered merely to postpone the creditor in the collection of his debt." We think this is a correct state-

ment of the law as to a frivolous appeal. See *Hartridge v. McDaniel*, 20 Ga. 398, 399; *Gilmore v. Wright*, 20 Ga. 198; *Garrison v. Wilcoxson*, 11 Ga. 157; *McMillan v. Lawrence*, 25 Ga. 192.

These embrace all the errors complained of in the motion for a new trial. Looking at the whole record, this court is forced to the conclusion that the case was brought here for delay only. The judgment of the court below is affirmed with ten per cent. damages assessed upon the principal sum recovered.

*Judgment affirmed.*

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ALEXANDER v. WILLIAMSON.

86	13
113	725
86	13
122	377

Where a bill of exceptions to the denial of a new trial fails entirely to conform to the act of November 11, 1889, prescribing the manner of bringing cases to this court, in that it does not specify the parts of the record material to a clear understanding of the errors complained of and does not mention the record at all, the judge cannot legally certify the same, nor has the clerk any authority for sending up any part of the record certified.

October 8, 1890.

Practice in Supreme Court.

Reported in the decision.

R. J. JORDAN, for plaintiff in error.

REID & STEWART, *contra*.

SIMMONS, Justice.

This case comes here upon a bill of exceptions which assigns as error the judgment of the court below refusing to grant a new trial. Section 2 of the act approved November 11, 1889, which prescribes the manner of taking cases to the Supreme Court (pamph. acts, p. 115), declares that "When a party desires to review the judgment of the court in granting or refusing a new trial, the plaintiff in error shall specifically set out the errors complained of, and shall specify only so

much of the brief of evidence and such other parts of the record as are material to a clear understanding of the errors complained of. The judge to whom such bill of exceptions is tendered shall, by any needful alteration, cause the same to conform to the truth and to refer to so much of the evidence and such other parts of the record as are material to a clear understanding of the errors complained of; and he shall cause the clerk to send up only so much of the evidence and other parts of the record as he may certify are material, except as hereinafter provided." The act further provides that "should the clerk below embody in the transcript of the record any part of the record not specified in the bill of exceptions or in the judge's order, he shall be allowed nothing for that part of the transcript."

Upon examination of the bill of exceptions in this case, it will be found that it fails entirely to conform to the provisions of the act. Instead of specifying the parts of the record material to a clear understanding of the errors complained of, it does not mention the record at all. The judge had no right to certify to such a bill of exceptions, nor did the clerk have any authority to attach any part of the record of the case to the bill of exceptions and certify to the same. The clerk can only send up such parts of the record as are specified in the bill of exceptions or in the judge's order. There being, therefore, no legal record in this case, we are compelled to dismiss the writ of error. *Hardee v. Lovett*, March term, 1890. 85 Ga. 620.

We do this less reluctantly because, from our examination of the grounds of error alleged in the motion for a new trial and the evidence set out in the bill of exceptions, we think the court did right in refusing to grant a new trial. *Writ of error dismissed.*

## SLOAN v. THE GEORGIA PACIFIC RAILWAY COMPANY.

A brakeman upon a railway who is under orders always to couple cars with a stick, and who has been in the employment of the company for a considerable time and has always heard that such was the rule of the company (as it in fact was), cannot recover of the company for an injury to his hand sustained whilst endeavoring to make a coupling directly with his hand without the use of a stick. It makes no difference that other employees frequently or customarily disregarded the rule unless the company, with knowledge of their practice, acquiesced in it in a way to sanction it, or practically to abrogate the rule. Nothing less would relieve the plaintiff from abiding by his uniform orders.

October 10, 1890.

Negligence. Railroads. Master and servant. Before Judge VAN EPPS. City court of Atlanta. December term, 1889.

Reported in the decision.

HOKE & BURTON SMITH, for plaintiff.

JACKSON & JACKSON, for defendant.

BLECKLEY, Chief Justice.

The plaintiff's hand was injured whilst he was between the cars endeavoring to make a coupling by the direct use of his hand. He testified at the trial that he had been in the employment of the company for a considerable length of time, and said: "I have always heard that it is the rule of the company to couple with a stick. That is what I have always heard. Those were my orders to always couple with a stick." The printed rules of the company contained this clause: "Cars must not be coupled by hand; sticks for the purpose long enough to prevent going between the cars will be furnished on application in Atlanta, Birmingham and Columbus, M." It thus appears that the plaintiff's information as to the rule was correct. He had provided himself with a stick of his own selection, which he thought was more suitable for the purpose than those

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86	500
86	15
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115	332
86	15
p118	283



furnished by the company, and this stick he had endeavored to use in making this particular coupling; but failing to succeed, he went between the cars and tried to accomplish the work with his hand. Had he abided by the rule of which he had always heard, and by the orders which had been given to him, it is manifest that the injury of which he complains would not have been received. Whatever fault there may have been in other employees, that fault would have been harmless to him if he had not violated his instructions. The whole pressure of the case, therefore, is upon the question whether he ought to be excused for committing such violation. The court charged the jury that "It would make no difference (if you find that he knew of the rule or that the facts in evidence charged him with notice of it), that other employees frequently or customarily disregarded it. To make this reply available as an excuse for non-observance by the plaintiff, you must be satisfied from the evidence that the defendant, the railroad company, knowing of the practice of employees to disregard it, acquiesced in it in such a way as to sanction it or as to be held practically to have abrogated it." We think this charge was correct in view of the fact that the plaintiff, besides having always heard that there was such a rule, had orders to always comply with it. Such being his orders, he should not have taken any license from the conduct of others, so long as he had reason to think that the rule was still in force and that he was expected to abide by it. This view of the subject disposes of several grounds of the motion for a new trial, and indeed, under the evidence, is decisive of the substantial merits of the whole case. Some of the grounds of the motion are very trivial, we might say almost frivolous, and to discuss them in detail would be a waste of time. It is sufficient to say that, in the light of the plaintiff's own

testimony, he has no cause for a new trial, for the one controlling reason that he owed the duty to the company as well as to himself to keep his hand out of the situation of danger in which he placed it. He knew his orders and they had always been invariable; there had been no exception. By violating them in this instance, he exposed himself to the very peril against which the company had endeavored to guard him. Why then should the company compensate him for a loss sustained by his own misconduct? The law is not so unreasonable as to require a new trial in a case like this over the finding of a jury and the approval of that finding by the trial judge.

The court committed no error in overruling the motion.

*Judgment affirmed.*

On rules of work and their violation, counsel cited Wood M. & S. §§400, 401; 3 Wood's Railway Law, §332; Railroad Co. v. Plunkett, 2 Am. & Eng. R. R. Cases, 133; Fay v. Railroad Co., 11 *Id.* 193; Sprong v. Railroad Co., 58 N. Y. 56; Hayes v. Mfg. Co., 41 Hun, 407; L. R., M. R. & F. Co. v. Leverett, 48 Ark. 348.

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**BOWE *et al.* v. THE GRESS LUMBER COMPANY, for use.**

1. Where one has brought an action in the name of another as suing for his use, without first obtaining the consent of the plaintiff in whom is the legal title to the cause of action, the latter may ratify at any time whilst the action is pending, and such ratification will relate back to the commencement.
  - (a) The fact of ratification appearing, an amendment to the declaration making the plaintiff a party is surplusage, he being already a party.
  - (b) When the bill of particulars annexed to the declaration is improperly headed, the defect is amendable and is cured by verdict.
2. In an action for goods sold and delivered, if it appears from the evidence that the articles set out in the bill of particulars were furnished under the contract, and that the items are correct, due and unpaid, a *prima facie* case is made for recovery

▼ 86-2

86	17
109	147
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115	27
115	111
86	17
127	534

3. The statute for bringing cases to this court contemplates that no evidence shall be brought up which is clearly immaterial. When this rule is violated and the material is blended and intermixed with the immaterial so that the labor of selection and separation is cast upon the court instead of being performed by counsel, the verdict will generally be treated as correct in so far as it depends upon a state of facts to support it.

October 10, 1890.

Actions. Ratification. Amendment. Parties. Practice. Evidence. Verdict. Before Judge VAN EPPS. City court of Atlanta. March term, 1890.

Reported in the decision.

J. B. GOODWIN and ARNOLD & ARNOLD, for plaintiffs in error.

CANDLER, THOMSON & CANDLER, *contra*

BLECKLEY, Chief Justice.

The action was brought in 1888 by petition, the petition importing on its face that the Gress Lumber Company, a corporation under the laws of this State, sued for the use of A. B. Steele. It alleged that the defendants below (plaintiffs in error here) were indebted to the petitioner in the sum of \$503.00, besides interest, on an account "as will more fully appear from the bill of particulars hereto attached." A bill of particulars was attached, headed: "Mr. W. F. Bowe, Atlanta, bought of A. B. Steele." The petition contained a second count, as follows:

"Petitioners further show that said W. F. Bowe and M. E. Maher are indebted to it, for the use of A. B. Steele, in the further sum of five hundred and three and sixty-one-100 dollars, besides interest, for that, heretofore, to wit, on the ——— day of July, 1886, the said defendants, in the name of W. F. Bowe, having the contract for certain work at the U. S. barracks, in said county, made a contract with said Gress Lumber Company to furnish a certain bill of lumber for the said barracks, it being understood at the time between the parties that A. B. Steele was to furnish one half of said

lumber, and that both defendants were contracting for and were to be responsible for the same, although it was to be 'billed' in the name of W. F. Bowe only. That under said contract and agreement by and between said defendants on the one side, and said Gress Lumber Company and A. B. Steele on the other, said Steele furnished to said Maher and Bowe, billing the same in the name of W. F. Bowe, lumber as shown in the account hereto attached as a bill of particulars under the first count; thereby said defendants became indebted to petitioners, for the said use, in the said sum of five hundred and three and 61-100 dollars, which said sum they refuse to pay."

Defendants having pleaded specially that neither of them made any contract or had any relations with A. B. Steele touching the lumber, the price of which was sued for, and that Steele had no authority or consent of the Gress Lumber Company to bring or prosecute this suit in the company's name for his use, the special plea was tried, by consent, before the judge without a jury. After hearing evidence, the judge sustained the plea, holding that no authority of the company had been obtained; and was about to dismiss the petition, but did not do so, allowing the plaintiff to amend, the amendment filed being as follows: "And now comes the plaintiff and shows that the Gress Lumber Company consents to and ratifies the bringing of said action, and prays to be made a party plaintiff (suing for the use of A. B. Steele) to said action." Mr. Gress, the president of the company, being present in court, assented to this amendment, and it was allowed over the objection of the defendants. The action was afterwards tried and a verdict rendered for the plaintiff. The defendants moved for a new trial, and the motion was overruled.

1. It is manifest that the corporation was the plaintiff in the action from the beginning; hence that portion of the amendment making it a party was super-

fluous. All that was needed was for the company to ratify the action and allow it to proceed, which was done by the president of the company, who appeared in open court for the purpose. The ratification related back to the commencement of the action, and gave as much authority for the use of the corporate name by Steele as if he had obtained permission to use the name for his benefit before instituting the action. This is the general rule as to the effect of ratification. *Perry v. Hudson*, 10 Ga. 362. Moreover, the second count in the petition indicates that there was an equitable element in the contract referred to in favor of Steele, who was to furnish one half of the lumber for certain work at the United States barracks, for which the defendants were both to be responsible. Under this allegation, it is not unlikely that Steele had a right to use the name of the corporation on the sole condition of indemnifying it against costs. Be this as it may, however, we think there was no obstacle to prosecuting the action after the president of the company assented to and ratified it. It was not a void action, but on its face was good, and was capable of being kept good, and was kept so, by ratification. The heading to the bill of particulars is only an awkwardness, and was amendable so as to make the same harmonious with the terms of the petition. And as the matter is one of form, rather than of substance, it is immaterial that no amendment of it has yet been made. Such a defect was curable, and is cured, by the verdict. In *Barron v. Walker*, 80 Ga. 121, a new cause of action was sought to be brought into the declaration; whereas here the cause of action remained the same, and was alleged in the petition as originally filed to be in favor of the original party plaintiff (the corporation), who sued in behalf of the usee both then and now claiming the fruits of the action. The only material new matter brought into the plead-

ing is the ratification, and that comes in avoidance of the defendants' special plea. We think it does avoid it effectually. That it did not come too late is manifest, for the court had passed no order dismissing or disposing of the case, and the allowance of the amendment followed at once upon the announcement that the plea was sustained by the evidence. No final judgment was rendered terminating the action.

2. The cause was tried before the jury on pleas going to the merits of the controversy. The court charged the jury: "If the plaintiff has shown to your satisfaction that the lumber embraced in the account sued on was furnished to the defendants under the contract mentioned in the declaration, and that the items of that account are correct, due and unpaid, he is entitled to recover, unless there is something presented in the pleas of the defendants to obviate that result." This charge is complained of as not holding the plaintiff to the burden of showing that the lumber furnished was in accordance with the terms of the contract, and delivered within the time stipulated in the contract. It seems to us that a fair construction of the court's language implies both these elements. If the lumber was furnished under the contract, and the items of the account are correct, due and unpaid, it would seem to us that the contract was in all respects complied with, and we can have little or no doubt that the jury understood the charge correctly.

3. Whether the jury arrived at a right result or not, we cannot possibly ascertain with perfect accuracy without reading and studying a mass of evidence which is quite voluminous, and which is capable of being condensed, so far as it is material, within manageable compass. The whole brief has been brought to this court without separating the material from the immaterial, and in this respect the act of 1889 has not been com-

plied with, either in letter or in spirit. We are quite willing to examine all the evidence in any case which is material, if counsel will take the trouble to eliminate that which is immaterial. But when both are left intermingled, so that we have to read all the trash and rubbish which drifts into the case during the trial and cull the material evidence out of it, we shall generally take it for granted that the jury and the court below have performed their functions in weighing the evidence as a whole correctly. We do so in this instance.

The head-notes are a part of this opinion.

*Judgment affirmed.*

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THE GEORGIA PACIFIC RAILWAY COMPANY v. BOWERS.

1. Where the direct issue between the parties in an action for damages against a railroad company was as to whether, on the approach of a train to a station, the company's agent exhibited only a white light, indicating that the road was clear and that the train might proceed without encountering collision or obstruction, or whether the agent also exhibited a green light under the white one, indicating that the train should proceed with caution and that there was another train on the road between the approaching train and the next station, and both sets of witnesses testified with equal positiveness, the question of positive and negative testimony was not involved, and a charge on such question was, therefore, not required.
2. If the theory of the plaintiff is correct, the facts to sustain which the jury found to be proved, he was not chargeable with negligence in not avoiding the collision which caused the injury, from the fact that in approaching a station three miles from the place of the collision, his train (he being engineer) was running at a rate of speed so high that the train was not then under his control; no accident having occurred there, and it not appearing that the collision occurred by reason of the speed at which the train was then running.
3. The plaintiff's injuries being grave and permanent, damages to the amount of \$2,266.86 do not appear to be excessive.

October 10, 1890.

Negligence. Evidence. Charge of court. Damages. Railroads. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

The plaintiff was thirty-eight years old at the time of the injury, and was earning about \$143 per month. His left leg was broken, and he was hurt through the breast and back. It was ninety-five days from the time he was hurt until he went back to work, and then he earned \$100 per month. He has never fully recovered, still suffers much pain, his leg swells and is shortened and enlarged. There was testimony that he would never entirely recover from the effects of the injury.

JACKSON & JACKSON, for plaintiff in error.

R. J. JORDAN, *contra*.

BLANDFORD, Justice.

This was an action by the defendant in error against the plaintiff in error, to recover damages by reason of the alleged negligence of the plaintiff in error in failing to give proper signals. It appeared upon the trial of the case, by the proof submitted by the defendant in error, that when he approached a certain station upon the railroad of the plaintiff in error, the agent of the plaintiff in error exhibited a white light, which meant that the road was clear and that the train upon which the defendant in error was might proceed without encountering collision or obstruction. On the contrary, the plaintiff in error insisted that its agent exhibited a white light, and under it a green light, which indicated that the train upon which the defendant in error was should proceed with caution, and that there was another train upon the road between him and the next station. This was the direct issue between the parties, defendant in error contending one thing, and plaintiff in error insisting upon the other, the witnesses for both parties testifying in their favor, the one set of witnesses being as positive as the other set. The witnesses for the defendant in error insisted that they were looking and that no green light was presented by the



agent, the witnesses for the plaintiff in error testifying with almost equal positiveness that there was a green light exhibited under the white light. Under such circumstances, it was for the jury to say what was proved, and they found in favor of the defendant in error. So we think, under these circumstances, that the question as to positive and negative testimony was not involved in the case, and therefore there was no evidence which required the court to charge upon the subject of positive and negative testimony.

Another question made in the case is, that it appears from the testimony that the defendant in error, as engineer, approached the station at Mableton at too high a rate of speed—at such a rate that the train was not within his control when he reached that station—and therefore plaintiff in error insists that the defendant in error was guilty of negligence in not having his train under control at the Mableton station, and that if he had so done, the accident would not have occurred at the other station. It appears from the evidence that the collision occurred some three miles distant, and it does not appear that it occurred by reason of the speed with which the defendant in error, as engineer, approached the station at Mableton. No accident occurred there, and we think that if the theory of the defendant in error is correct, the facts to sustain which the jury found to be proved, he was not chargeable with negligence on account of the high rate of speed with which his train approached the station at Mableton.

Plaintiff in error also insists that the damages found by the jury in this case are excessive. We do not think so. The injury which the defendant in error received was very serious and grave.

There are several other points insisted upon by the plaintiff in error, which to our minds are wholly immaterial in the determination of this case. And whether

they are well-taken or not it is unnecessary to consider, as they cannot, in the view we take of the case, be cause for a new trial. *Judgment affirmed.*

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SCHUMANN v. TORBETT *et al.*

Where the defendants in an action for damages for maliciously and without probable cause suing out process of garnishment, had previously applied to the judge of the superior court to appoint a receiver and grant an injunction against the plaintiff, on the ground that he was an insolvent trader and owed past due indebtedness, the petition for injunction and receiver and the order refusing them were both admissible as tending to throw light on the question whether the defendants were actuated by malicious motives in suing out the process of garnishment.

October 10, 1890.

Malicious suit. Evidence. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Reported in the decision.

HALL & HAMMOND, for plaintiff.

KING & ANDERSON and W. R. BROWN, for defendants.

BLANDFORD, Justice.

This was an action to recover damages, brought by the plaintiff against the defendants, on account of the defendants having maliciously, without probable cause, sued out a process of garnishment in an action brought by Torbett against Schumann.

In a case like this, the main question to be considered is, whether the process of garnishment was in fact sued out maliciously and without probable cause. And the evidence in this case being very close upon that question, and it appearing to be sufficient to authorize a verdict of the jury either way, we think that where the defendants in error had applied previously to the judge of the superior court to appoint a receiver and grant an injunction against the plaintiff in error, upon the

ground that he was insolvent and the debt was past due, he being a merchant and trader, that not only the petition filed against the defendant by the plaintiffs, but also the order of the chancellor refusing the injunction and the appointment of a receiver, should have been admitted in evidence upon the trial of the case. It certainly had a tendency to throw some light upon the question of whether the defendants had been actuated by malicious motives or not in suing out the process of garnishment complained of. And upon this ground the judgment of the court below is *Reversed.*

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NESBIT *et al.* v. DONALD.

1. On a petition for an injunction and receiver, on the ground that the defendant, by fraud and undue influence, procured a deed to be made without consideration, and contrary to the intention and desire of the maker as to the disposition of her property, the evidence being conflicting, the discretion of the judge in denying the injunction and receiver will not be interfered with.
2. The petition alleging that the instrument in question is a deed but is void because procured by fraud and undue influence, and this being the only point made by the pleadings and the evidence, the question whether the instrument is a will instead of a deed and is void for insufficient attestation, is not for decision by the Supreme Court, because it was not made in the court below.

October 10, 1890.

Injunction. Deeds. Practice. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Reported in the decision.

J. R. WHITESIDE, for plaintiffs.

R. J. JORDAN, for defendant.

SIMMONS, Justice.

Melissa Nesbit, Lula Williams and Henry Williams (the latter by his next friend) filed their petition against S. M. Donald, seeking to set aside a certain deed of

gift made by Ann Davis, an aunt of the petitioners, to the defendant and two of the petitioners, Melissa Nesbit and Lula Williams, upon the ground that the defendant procured the deed to be made by fraud and undue influence; that the signing of it was not the free act of the said Ann Davis; that there was no consideration whatever for it; and that it was contrary to her intention and desire as to the disposition of her property, and was a cloud upon the title, which they had a right to have removed. The petition also prayed for an injunction and the appointment of a receiver.

1. The case comes to this court upon **exceptions** by the plaintiffs to the refusal by the trial judge to grant an injunction and appoint a receiver. We do not think he erred in so doing. The evidence of the plaintiffs and of the defendant was conflicting upon the questions made in the bill; and, as frequently decided by this court, where such conflict exists and the trial judge refuses an injunction or the appointment of a receiver, his discretion will not be interfered with.

2. In the argument before us, it was insisted by counsel for the plaintiffs in error that the instrument sought to be set aside was not a deed, but was a will; and that it was void as a will because executed in the presence of two witnesses only, instead of three as the code prescribes. This point, however, so far as the record discloses, was not made in the court below. On the contrary, the petition alleges that the instrument is a deed, but is void because procured by fraud and undue influence; and this was the only point made by the pleadings and the evidence before the trial judge. The plaintiffs in error cannot change the issue after the case comes to this court, and insist that the instrument is void upon a ground not taken in the pleadings in the court below. If the instrument is a will and not a deed, the plaintiffs in error, if they desire to do so, may

amend their bill and make the proper allegations; and the learned judge in the court below will doubtless decide the question according to law. As the case now stands we must affirm the judgment.

*Judgment affirmed.*

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CLARK v. LEE *et al.*

The condition of a bond given by a tenant on interposing a counter-affidavit to the execution of a dispossessory warrant sued out by his landlord, being that he should pay to the plaintiff whatever sum, with costs, the plaintiff should recover against him on the trial of the case between them, a declaration on the bond which alleges no judgment of recovery and failure to pay, sets out no cause of action; although it appears that the counter-affidavit was dismissed as defective, and that the warrant was executed.

October 10, 1890.

Bonds. Landlord and tenant. Dispossessory warrant. Pleadings. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Reported in the decision.

G. S. THOMAS and HARRISON & PEEPLES, for plaintiff.  
No appearance for defendants.

SIMMONS, Justice.

Clark sued Lee, Hamilton, Cooper and Peel, making in his petition the following allegations, in substance: In March, 1882, Lee went into possession of certain described realty as a tenant of petitioner, agreeing to pay a certain monthly rental. In January, 1883, Lee being in arrears for rent, petitioner demanded the rent due, and Lee failing to pay, demanded possession of the premises, which Lee refused to deliver. On February 8, 1883, petitioner commenced proceedings before a magistrate against Lee as a tenant holding over, and copies of the affidavit of petitioner and the dispossessory warrant sued out thereon are annexed to the petition.

On February 12, 1883, Lee made and delivered to the officer who was executing the warrant, a pretended counter-affidavit, and also delivered to him a certain writing, pretending that it was a bond with good security, payable to petitioner for such sum as might be recovered against Lee on the trial of the case in terms of the law, as required in section 4079 of the code. After a long litigation about this matter, Lee was finally ejected, and Clark brought suit upon the bond to recover damages for a breach thereof. The case came on for trial, and counsel for the defendants demurred to the same; and the demurrer was sustained and the case dismissed. The able and learned judge who decided the case in the court below, delivered his opinion in writing and had it attached to the record. We have examined the opinion, and with the exception of a few verbal changes, adopt it as the opinion of this court. It is as follows:

The question to be determined by the court is, whether or not, under the facts stated in the declaration, there has been any breach of the bond sued upon. Whether there has been a breach of such bond or not must depend, of course, upon the condition of the bond, and upon what has taken place between the parties thereto. The condition of the bond is, that the obligor shall pay to the plaintiff in the suit whatever sum, with costs, the plaintiff shall recover against the defendant on the trial of the case between these two parties. The case made between them is as to whether or not the defendant is a tenant of the plaintiff. If on the trial of this issue it is determined adversely to the defendant, then it is the right of the plaintiff to recover of the defendant, by the verdict of a jury, double the amount of rents stipulated to be paid by the defendant to the plaintiff; or, if there be no contract as to rents, double what the premises are shown to be worth

for rent. What I have stated shows the condition of the bond. Now what has taken place?

When this case came up for trial, the defendant's affidavit was dismissed on account of some defect in it. Nothing further was done. The case then in legal effect left the court. There was no obstruction to the execution of the warrant. The warrant was in point of fact executed. There certainly has, therefore, been no breach of the bond in terms,—that is, no failure by the obligors to pay the plaintiff the sum recovered by him on the trial of the case. It is claimed on the part of the plaintiff, however, that this judgment by which the defendant's affidavit was dismissed from the court, was equivalent to a judgment of recovery, and that, accordingly, there has been a breach of the bond in substance. To support this view the plaintiff has cited three cases, to wit, 25 Ga. 359; 74 Ga. 680; 77 Ga. 24. These are cases in which it was determined that where, in an action of trover, the defendant does not give bond for the property (bond being required), and the plaintiff does give bond, and the plaintiff afterwards voluntarily dismisses his action of trover, this dismissal amounts to a breach of the bond. It is held to be a breach of the bond because, in the opinion of the Supreme Court, the dismissal amounts to a judgment of restitution—that is, a judgment that the property be restored to the defendant in the action. It is held that this is the effect of the judgment without anything more being done; that the judgment *per se* has that operation in law. The effect of the judgment rendered in this case, dismissing the defendant's affidavit, is altogether different. What that effect is the Supreme Court has clearly stated in this very case when before it for review. (80 Ga. 619.) This is the language of the court. "The counter-affidavit is the means of bringing the case into the superior court, and giving that court jurisdiction of

that kind of cases. Whenever the counter-affidavit is so defective as not to make any issue, or when the same has been dismissed by the court, the whole case goes out of court. There is no case for the court to try. By operation of law the warrant is withdrawn from the court, and returns into the hands of the sheriff or other officer to whom it is directed. In the case of *Habersham v. Eppinger & Russell*, 61 Ga. 199, this court held that it is the counter-affidavit which brings the case into the superior court; and 'unless that was legal, it was the duty of the sheriff to go on with his levy and sale; and when the court dismissed that counter-affidavit because it was illegal, the case was no longer in that court, and it had no jurisdiction to pass the order, or render the judgment, dismissing the plaintiff's warrant or setting it aside. The case, by operation of law, was remanded to the sheriff, and the superior court had no jurisdiction of it further.'"

Now in the trover case, the effect of the judgment, as I have said, is to entitle the defendant at once to an order for the restitution of the property. The plaintiff in the trover case having engaged by his bond to restore it, there is a breach of the bond whenever there is a judgment for its restoration, and a failure to restore. In this case the plaintiff was entitled to recover of the defendant such a sum of money as the jury might find the plaintiff was entitled to upon exhibition of his proof, and upon its being established that the defendant was the tenant of the plaintiff. It is only after such a judgment of recovery has been had and there is a failure to pay, that the condition of the bond has been broken. The plaintiff therefore has no cause of action on the bond. The declaration alleges no recovery whatever, not even for costs. Had costs been recovered and not paid, there would have been a liability upon the bond to that extent. *Judgment affirmed.*



## BROWN v. DOANE.

1. If by a false and fraudulent oral promise which he intends at the time of making it afterwards to violate, the vendee of two contiguous parcels of land which he has contracted for by separate and distinct contracts, induces the vendor to convey to him both parcels by one and the same absolute unconditional deed, he paying for one parcel, but not for the other, equity by reason of his fraud will fasten upon him a constructive trust in behalf of the vendor as to the parcel not paid for, although the two parcels are not described in the deed as several tracts but both together are treated as one tract.
2. Whether a written undertaking to pay for land when the vendor produces and puts in the hands of the vendee a complete chain of paper title from the State down to the vendor imports a duty in the vendor to make efforts to procure such a title to be executed if it does not already exist, open to explanation by parol evidence, the language of the instrument being ambiguous.

October 13, 1890.

Equity. Contracts. Vendor and purchaser. Fraud. Trusts. Evidence. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Mrs. Brown by her petition alleged, in brief, that about August 15, 1887, she executed a conveyance to E. A. Doane to sixty acres of land; that the conveyance was conditional as to five of the acres, and she received from Doane, at the same time she made the deed to him, a writing reciting that he had that day purchased from her her home plantation, to which she had made him a deed, and that he agreed to pay her \$200 without interest whenever she placed in his hands a good chain of title in fee simple, from plat and grant down and into her, of five acres of the land, describing it; that the writing contained a stipulation that it was not to be transferred to any one, and payment was to be made only when the conditions for which it was given were strictly complied with; that she had, in good faith, complied with her part of the contract as to the five acres, having delivered to Doane the chain of title

possessed by her, but with this he pretended to be dissatisfied and refused to accept it, and upon such refusal she demanded that he deliver up the deed which she had executed to him, or make to her a conveyance of the five acres, or pay her the \$200, but he refused all these propositions; that under her deed and his obligation to her, and the agreement of the parties at the time of the transaction, Doane was not to become the purchaser of the five acres, which was under a different chain of title from the rest of the land, unless within a reasonable time she had furnished him a satisfactory chain of title, and the five acres were to be conveyed back to her within a year, and it was upon the faith of this parol understanding that she executed her deed; and that this outstanding deed is a cloud upon her title to the property. She prayed that the court order Doane to convey back to her the five acres. By amendment she alleged that before she filed her petition, and after defendant had for many months refused to pay for the five acres, she procured her attorney to call upon him and insist upon his paying the note, or conveying back the five acres, but defendant refused to comply with either request and referred the attorney to his agent, John A. Doane, who insisted that the defendant should keep the land as well as not pay the note. This last conduct has proved conclusively that the Doanes meant to defraud her in the beginning. They objected to her title to the five acres and she did not want to make a deed to the same, but they insisted on its being made, and then instead of paying her for it drew up the writing from Doane to her above referred to, with impossible conditions. She procured and delivered the best title she could, being that upon which she bought and paid for the land, but defendant refused to pay, etc.

Upon the trial the plaintiff introduced the deed mentioned above, and the written agreement given to

her by Doane coterminously with the execution of the deed. Her attorney testified that, before the bringing of the suit, he had several conferences with defendant and his agent; that he asked defendant to pay the note but he declined to do this, saying that Mrs. Brown had not produced the plat and grant from the State down; that he asked defendant to deliver up the land, but this defendant declined to do and referred him to John A. Doane; that he showed John A. such deeds as plaintiff was able to produce, and John A. said perhaps defendant would waive the plat and grant if witness could get certain other deeds, but these deeds plaintiff never had. Plaintiff here proposed to show by this witness what efforts she had made to ascertain her chain of title, which the court declined to hear. The plaintiff testified that the five acres in dispute were under a different chain of title from the remainder of the tract, and defendant did not seem to be satisfied with it; that at the time of drawing the deed, he drew up the other writing and gave it to her; that in August, 1887, he took possession, and has been in possession ever since, of the entire tract, the fifty-five acres being well improved and the five acres unimproved; that she was paid for the land \$2,200, \$200 being held out for the five acres, which she has never received. She proposed to testify further that the sale of this land was expressed by the parties to be at \$40 per acre; that before the making of the deed, defendant agreed that in case she failed to obtain after reasonable search the plat and grant from the State down and into herself, he would return the land to her; that the deed to the entire tract was made for the sake of convenience as to these five acres, and on the faith of defendant's undertaking that if the title should not prove as he had specified in the writing he gave her, the land would be returned to her; that the contract as to this five acres

was separate and distinct from the remainder of the land, and it was with this understanding that the conditional agreement was signed; that she had made every effort in her power to get the plat and grant from the State down, but had failed and had so informed him, and it was impossible for her to get it; and that she merely allowed him to go into possession of these five acres with the rest of the tract. The court refused to hear this evidence also. Plaintiff offered to show by another witness that she, her grantor and the grantors of her grantor, had been in possession under deeds, openly, notoriously and adversely for twenty years. This the court refused to admit in evidence.

Plaintiff then tendered the amendment quoted in the opinion, but the court declined to allow it; and on motion of defendant, granted a nonsuit. Plaintiff excepted.

ARNOLD & ARNOLD, for plaintiff.

ROSSER & CARTER, for defendant.

BLECKLEY, Chief Justice.

Mrs. Brown, by warranty deed absolute in terms, expressing a consideration of \$2,400 in hand paid, conveyed to Doane in fee simple, as one tract containing 60 acres more or less, parts of land lots Nos. 94 and 99 in the 14th district of Fulton county. Doane at the same time delivered to her his written obligation reciting that he had purchased her home plantation near Hapeville, to which she had made him a deed, and proceeding as follows:

"I hereby agree and bind myself to pay to Mrs. Sudie C. Brown the sum of \$200 without interest, whenever she produces and places in my hands a good chain of title in fee simple from plat and grant down and into Mrs. Sudie C. Brown of the five acres of land on land lot number 94 . . . which is embraced in said Mrs. Sudie C. Brown's deed to me. This note is not to be transferred to any one, and to be paid only when the

conditions for which said note is given are strictly complied with."

This sum of \$200 added to \$2,200 actually paid would be requisite to make up the amount expressed in the deed as the consideration. The parties differing as to the sufficiency of the chain of title which Mrs. Brown afterwards presented to Doane, and he refusing to accept the same, and also refusing to pay the balance of the purchase money or to surrender the five acres of land, she filed her petition in the nature of a bill in equity, to compel him to do one or the other of these things. She alleged in her petition as amended, in substance, that before and at the time the deed was executed, he promised and agreed that he would restore to her the five acres of land (of which at the time of the conveyance he had obtained possession as a part of the tract), in case she could not produce the chain of title described in his obligation. The case coming on for trial, and some of her evidence being introduced, and more offered but excluded, she proposed to still further amend the petition by adding the following in substance:

"Petitioner avers that at the time of and before the deed from herself to Doane was made, he promised and agreed to return the five acres in land lot 94, in case it developed that petitioner could not procure a plat and grant from the State down. On the faith of said agreement to return back the five acres in case it turned out, after a reasonable search, that petitioner had no plat and grant from the State down, petitioner made the deed to said five acres together with the other fifty-five acres, and she would not have made such deed except on the faith of said agreement. The five acres was not paid for and has never been. The contract as to the five acres was separate and distinct from the sale of the 55 acres. Petitioner has made every effort to obtain such title, but as it was not in existence, she was not able to find it. Defendant, though requested, failed to return the land. The promise and failure to return the

land constitute a fraud on the part of defendant, whose original design was fraudulent. Said original representation was made with intent to induce petitioner to make such absolute conveyance, and with the intention of holding said land after such conveyance was made. Petitioner further avers that the deed and note constitute an ambiguous contract, and that the parol agreement was, that in case she could not, after a reasonable search, obtain the required title, the land was to be returned and conveyed back to her. She avers that she retained the beneficial interest in the land, and prays that a resulting trust and a conveyance to her be decreed."

The amendment was disallowed, and the plaintiff offering no more evidence, the court granted a nonsuit. For a more enlarged statement of the facts, see the official report.

1. The bill of exceptions assigns several errors, but at this stage of the proceedings, it is necessary for us to deal specifically with only one of the assignments. We think the court erred in disallowing the amendment, and consequently that the trial was conducted throughout on a misapprehension of the law applicable to the case. The amendment alleges that the purchase of the five acres was made by a separate contract, and that this part of the tract was included in the deed by reason of Doane's promise and undertaking to restore it if the plaintiff could not produce the title papers stipulated for, and that he made the promise to induce the plaintiff to execute such absolute conveyance and with the intention of holding the land after such conveyance was made. This virtually charges him with actual fraud and deceit, not only in violating the parol promise relied upon, but in making the same. If he procured the conveyance of these five acres by means of a wilful and intentional fraud, equity will lay hold of his conscience and compel him to perform his promise, notwithstanding it was made orally and never reduced to

writing. There is no law which requires a fraudulent undertaking to be manifested by writing. Those who use promises, which they make deceitfully, for the purpose of accomplishing fraudulent designs, are generally careful not to furnish written evidence of their turpitude. Such promises, whatever may be their terms, do not, unless reduced to writing, raise express trusts, but the law, acting upon them according to their nature, makes them a basis upon which to build up in favor of the defrauded party an implied or constructive trust. Code, §§3194, 2316, par. 2. "A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose, as for example a promise to convey the land to a designated individual, or to reconvey it to the grantor, or the like, and having thus fraudulently obtained the title, he retains, uses and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained, is in fact a scheme of actual deceit. Equity regards such a person as holding the property charged with a constructive trust, and will compel him to fulfil the trust by conveying according to his engagement." 2. Pomeroy's Eq. Jur. §1055. "In order that the doctrine of trusts *ex maleficio* with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute of frauds would be virtually abrogated; there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." *Id.* §1656. The distinction between making a promise with intention to break it and a mere breach of a promise not fraudulent in itself, is well brought out by the cases of

*Manning v. Pippen*, 86 Ala. 357, and *Brock v. Brock* (Ala.), 8 So. Rep. 11, read in connection with *Patton v. Beecher*, 62 Ala. 579. Nothing contrary to the principle of these authorities was cited in the argument. The case of *Stillman v. Canales*, 25 Tex. 313, 78 Am. Dec. 530, read by the learned counsel for defendant, was an action at law for the purchase money and involved no question as to the effect of fraud committed at the time of passing the legal title. The same may be said of *Runkle v. Johnson*, 30 Ill. 328, 83 Am. Dec. 191, and *Hall v. McArthur*, 82 Ga. 572. Nor was there any question of fraud involved in *Gilbert v. Peteler*, 38 N. Y. 175, 97 Am. Dec. 785.

2. The petition and amendments proceeded upon a construction of the obligation of Doane to pay the \$200, which may or may not be correct. The terms "when-ever she produces and places in my hands a good chain of title in fee simple from plat and grant down and into Mrs. Sudie C. Brown," seem to us ambiguous. The plaintiff construes them as not contemplating anything to be done on her part to procure such a title, but only to discover and produce it in case it was already in existence when this transaction took place. Should this construction prove incorrect, it may be that, even if a fraud upon her was designed in the beginning, she could not rightfully reclaim these five acres of land until she had made diligent and faithful effort, without success, to procure and produce such a title, though it may not be yet in existence. We doubt not that, under the provisions of our Code, §§2757, 3801, extrinsic evidence would be receivable to aid the court and jury in arriving at the true meaning of this ambiguous language. *Mason v. Deese*, 30 Ga. 308; *Barrett v. Powell*, 63 Ga. 552.

The court erred in disallowing the amendment, and consequently in granting a nonsuit.

*Judgment reversed.*



## WYNNE v. CONKLIN.

Whether the plaintiff, a boy of thirteen years, employed by the defendant to work in a tin-shop, was of sufficient age and capacity to appreciate his hazard and provide against danger, is for the consideration of the jury; it appearing that, several times previous to the injury complained of, he had been put to work on the machine which did the injury, that it was large and heavy, that a boy of his size and age was not able successfully to operate it, that boys in the shop were allowed, when not at work for the defendant, to use it in making things they desired, and that on the occasion of the injury the plaintiff had finished his work and in the presence of the foreman of the shop was cutting out a trinket for himself on the machine.

October 13, 1890.

Master and servant. Infants. Negligence. Before Judge VAN EPPS. City court of Atlanta. March term, 1890.

Reported in the decision.

ARNOLD & ARNOLD, for plaintiff.

P. L. MYNATT, for defendant.

BLANDFORD, Justice.

The declaration of the plaintiff in error alleged that he was employed by the defendant in error to work in and about his tin-shop, to do such work as might be required of him by his employer; that he was thirteen years of age, and had been put to work by the defendant upon a large and heavy machine, known as the "square shears" for cutting tin; that he was too young and small to work this machine properly and safely; that while in the course of his employment, after he had finished his work for his employer, he went to the machine and was cutting out some trinket for himself; that the foreman was present in the shop and did not prevent him from so doing; that while thus using the machine, and not being able to appreciate the danger, he had two fingers of his hand cut off; and he alleges

negligence on the part of his master in not preventing him from using the machine, and asks damages for such injury.

The testimony introduced by the plaintiff, which was weak, tended to support his declaration. He showed that the machine was a large one and heavy, and that a boy of his size and age was not able to successfully operate it; that previous to the injury, he had several times been put to work on this machine; that the boys in the shop were allowed to use the machine in making any trinkets or things they desired, when not required to work for their master. He showed that he was thirteen years of age. He did not testify whether or not he then knew the machine was dangerous, or whether he had sufficient capacity to appreciate and prevent the danger. At the conclusion of the plaintiff's evidence, upon motion of the defendant, the court awarded a nonsuit, and the plaintiff excepted and says the court committed error in so doing.

We think the case made by the plaintiff was quite a weak one for the consideration of a jury. Yet we are not prepared to affirm the judgment of the court below awarding a nonsuit. It is laid down by Shearman & Redfield in their work on Negligence (vol. 1, §218), and fully sustained by the authorities referred to, that "It has always been assumed, and usually without argument, that the general rule limiting the liability of a master to his servants, applies to minor servants as well as to others; no distinction being made on account of their incapacity to contract for the assumption of such perils. Thus, where a servant is set at dangerous work, the mere fact of his minority does not render the master liable for the risk, if the servant has sufficient capacity to take care of himself and knows and can properly appreciate the risk. But, while the mere fact of minority is deemed immaterial, it is well-settled, in

America at least, that any actual incapacity of a minor to understand and appreciate the perils to which he is exposed is to be fully considered, and that he can recover from his master for injuries suffered from any perils, the nature of which he did not know, or could not properly appreciate if he did nominally know, and to which a prudent and right-minded master would not have allowed him to be exposed." Now, in this case, whether the plaintiff knew of the hazard or peril—whether he was of sufficient age and capacity to appreciate the same and provide against danger—are questions of fact which cannot be judicially determined by a court, but must be left to the consideration of a jury. We think the case of *Rhodes v. Georgia R. R. & Banking Co.*, decided January 27th, 1890, and which will be found in 84 Ga. 320, applies to the present case; and what was said in that case to some extent governs this case. So, after much consideration and investigation, we have arrived at the conclusion that the court below erred in granting a nonsuit. *Judgment reversed.*

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#### THE CENTRAL RAILROAD AND BANKING COMPANY v. FOLDS.

A motion to reinstate a case after the award of a nonsuit is in the nature of a motion for a reconsideration, and is addressed to the legal discretion of the court; and for the Supreme Court to interfere with a judgment reinstating such case, it should appear that the court below abused its discretion.

October 13, 1890.

Nonsuit. Practice. Before Judge VAN EPPS. City court of Atlanta. March term, 1890.

Reported in the decision.

CALHOUN, KING & SPALDING and J. T. PENDLETON, for plaintiff in error.

ARNOLD & ARNOLD, *contra*.

86	42
114	198
86	42
125	406

BLANDFORD, Justice.

The court in this case awarded a nonsuit. The defendant in error (who was the plaintiff in the court below) moved that the court set aside the judgment or nonsuit and reinstate the case, which the court did, whereupon the defendant excepted and alleges this was error.

Where a motion is made to reinstate a case after a nonsuit has been awarded, it is in the nature of a motion for a reconsideration, and addresses itself to the sound legal discretion of the court. This court would be very loath to interfere with the judgment of the court below reinstating the case. In other words, it would have to be such a case as that it should appear that the court abused his discretion in reinstating the case. In this case we do not think there was any abuse of the discretion of the court in setting aside the judgment of nonsuit and in reinstating the case.

The judgment is

*Affirmed.*

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THE ATLANTA AND WEST POINT RAILROAD CO. v. LOFTIN.

The action being against the railroad company for injuries to the plaintiff, who was struck by the train when crossing the track, if it clearly appears from the plaintiff's evidence that he could have avoided the injuries by the use of ordinary care, a new trial should be granted after verdict in his favor, whether the railroad company was negligent or not.

October 13, 1890.

Railroads. Negligence. Before Judge VAN EPPS.  
City court of Atlanta. June term, 1890.

Reported in the decision.

CALHOUN, KING & SPALDING and J. T. PENDLETON, for plaintiff in error.

BIGBY & BERRY, *contra*.

86	48
90	506

86	48
113	712

SIMMONS, Justice.

Loftin sued the railroad company and recovered a verdict of \$1,000, for personal injuries which he alleged he had sustained by reason of the defendant's negligence. A motion for a new trial was made by the defendant and was overruled by the court. On the trial of the case the plaintiff testified, in substance, as follows: Upon returning from a visit to a neighbor, he had to cross the railroad track, about 2:30 o'clock in the afternoon. He thought the train had gone by. The wind blew pretty briskly. When he got pretty close, he looked up and down the road and saw no train and heard none blow. When he got almost across, he looked and the train was right upon him. In trying to escape he fell. It did not knock him clear off. It carried him around in a gully. When he first saw the train he just put his foot nearly in the track. He was nearly across the track when he first saw the train. The place at which he was hurt was about twenty yards inside of the limits of the city of Grantville, and a blow-post was about 111 yards above the place where he was hurt, and it was 287 yards from the crossing to where he was hurt. There was a foot-path about a foot wide that crossed the place where he was hurt. When he came to the track he thought the train was behind the regular time, but he looked up and down the track and could see about 400 yards up the track. He looked for the train just before he went to cross. He was about one step from the track when he looked. He could see 400 yards up the track, and there was no train. He stepped on the cross-ties, and then in no time got his foot middle-way. He was standing one step from the track, and there was no train in 400 yards, and he tried to cross and got nearly to the outside rail when the train struck him. When he started across he did not see any train in 400 yards. Four steps would have

carried him over to the far rail on the other side. The train struck him while he was making the third step. He said he looked the first time and there was no train. When he went to cross he heard a sort of lumbering. He looked and saw the train, and it was right upon him. The train was not more than ten steps from him when he made the third step. It would have had to run about 290 yards between the time he made the first step and the time he made the third.—The railroad proved by two witnesses that the plaintiff said, shortly after he was hurt, that he saw the train before it struck him, and that he thought he could “make it across the road before it struck him.” There was conflicting evidence as to whether the whistle on the engine was blown at the blow-post 111 yards above where the plaintiff was struck.

Leaving out of consideration the question as to whether the railroad was negligent or not, we think the trial judge erred in refusing to grant a new trial. We think it clearly appears from this evidence that if the plaintiff in the court below had exercised any sort of diligence, he could have avoided the injury. It was broad open daylight, and a train could have been seen 400 yards from the place where the plaintiff was hurt. He was not upon a public crossing. He testified that he looked and listened and saw no train, and yet, according to his testimony, by the time he took three steps across the track he was struck by the engine. It could not possibly have taken him more than six seconds to have made the three steps, yet according to his testimony the train must have come in sight and run 290 yards in that time. It seems to us that if the train had been near enough to strike him by the time he could make three steps, he could have seen it in time to have avoided the injury, if he had exercised any diligence at all. Our code, §2972, provides that if the

plaintiff could by ordinary care have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. The plaintiff's own testimony having shown that he could have avoided the injury by the exercise of ordinary care, and it being the only evidence introduced in his behalf as to the manner in which he was injured, we think the court below ought to have granted a new trial.

Moreover, the account he gave of the manner of his injury was so improbable that it was not worthy of any credit. To say that the train ran 400 yards and struck him before he could take four steps across the track, and knocked him off without breaking any bones or lacerating his skin, and that too while he was standing in the middle of the track, is too improbable to believe. We are inclined to think that the account he gave shortly after he was hurt is the true one,—that is, that he saw the train, but thought he could cross before it struck him.

*Judgment reversed.*

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DAVIS v. WIMBERLY.

1. On the trial of a suit by a partner against his copartner, brought after dissolution of the partnership, for money claimed to have been collected by the defendant and not accounted for, the defendant, though having filed no plea, was entitled to participate in the selection of a jury and to cross-examine any witnesses introduced by the plaintiff.
2. The declaration alleging only that there was a certain amount of indebtedness of the defendant to the plaintiff, that there had been a partnership between them which had been dissolved, and that the defendant refused to pay the plaintiff any part of said indebtedness, testimony by the plaintiff to prove the amount of the indebtedness to the firm, the amount of assets on hand at the time of the dissolution, that these assets went into his possession, that he paid the debts of the firm, and that the amount of them was more than the amount of the assets he received, was not admissible. This testimony having been properly ruled out, and there not being left sufficient evidence to authorize a finding for

the plaintiff, a nonsuit was the right result. But, the plaintiff's case being meritorious, leave is granted, on proper amendment to the declaration, to reinstate the action, with leave also to the defendant to plead.

October 15, 1890.

Nonsuit. Partnership. Pleadings. Practice. Evidence. Before Judge VAN EPPS. City court of Atlanta. March term, 1890.

Reported in the decision.

BLALOCK & BIRNEY, for plaintiff.

COX & REED, for defendant.

SIMMONS, Justice.

Davis sued Wimberly for \$324.45, alleging that amount was due him by Wimberly; that they had been partners, and that the partnership was dissolved; and that Wimberly had this amount of money more than he was entitled to. Wimberly filed no plea. When the case was called, the court ordered counsel to strike a jury. Counsel for plaintiff objected to defendant participating in striking the jury, upon the ground that he had filed no plea and had no standing in court, which objection was overruled by the court. Plaintiff was introduced as a witness, and his counsel, having finished his examination, objected to his being cross-examined by the defendant, on the ground that, having filed no plea, he was not entitled to cross-examine his witnesses. This objection was overruled by the court, and these two rulings of the court constitute the first two assignments of error alleged in the bill of exceptions. The plaintiff having testified, among other things, as to the amount of debts owed by the firm at the time of dissolution and the value of the assets which had come into his hands, and as to the relative amounts of the debts and assets, and as to the payment of the debts by him, on motion of defendant's counsel the court ruled out said evidence, upon the



ground that the same was not covered by the pleadings, to which decision plaintiff excepted. After ruling this evidence out, the court, on motion of defendant's counsel, granted a nonsuit, and these rulings constitute the other errors assigned in the bill of exceptions.

We think that although the defendant in this case had filed no pleas, he was entitled to participate in the selection of the jury to try the case brought against him, and to cross-examine any witnesses introduced by the plaintiff. While he could not introduce testimony in his own behalf, he had a right to stand by and see that the plaintiff made out such a case as would entitle him to recover. As was said by this court in the case of *Hayden v. Johnson*, 59 Ga. 106, "Default, according to the system of practice which has long prevailed in this State, is not equivalent to a confession of the plaintiff's cause of action. The defendant, while in default, may resist, passively, whatever is brought to attack him, but cannot make a counter-attack. Though not allowed to return the fire, he is not obliged to run, but may stand until he is shot down." In the case of *Durden v. Carhart*, 41 Ga. 81, this court said: "The only effect of a failure to plead, is the loss of the right to introduce evidence. But this neither relieves the plaintiff from the necessity of making out his case by proof, nor deprives the defendant of the right to object that the plaintiff has failed to meet this requirement." Counsel for the plaintiff in error relied upon the case of *Stephens v. Gate City Gas Co.*, 81 Ga. 150, to support his contention that the trial judge erred in allowing the defendant to strike a jury and to cross-examine plaintiff's witnesses. That case, upon this point, only ruled that where defendant had been sued upon an open account, and suit was served personally upon him and he failed to file any plea thereto, under section 3457 of the code, the case was considered in default and the plaintiff

permitted to take judgment as if each and every item were proved by the testimony; and that under this state of facts, the judge did not err in refusing to allow counsel for the defendant to address the jury, there being nothing for counsel to argue before the jury, the statute construing defendant's failure to file a plea as an admission of the correctness of the account. This not being a suit upon an open account, as the one in 81 *Ga.*, but one between partners, that case is not in point. The court was therefore right in allowing the defendant in this case to strike the jury and cross-examine plaintiff's witnesses.

The next two grounds of complaint are, that the court erred in ruling out the testimony of plaintiff mentioned above, and in granting a nonsuit. This was an action by one partner against the other for money which the plaintiff claims the defendant had collected and failed to account for to the firm. The only allegation in the declaration was indebtedness of the defendant to the plaintiff; that there had been a partnership between them, which had been dissolved; and that the defendant refused to pay to plaintiff any part of said indebtedness. The plaintiff testified as to these facts, and undertook to prove further the amount of the indebtedness of the firm, the amount of the assets on hand at the time of the dissolution, that these assets went into his possession, that he paid the debts of the firm, and that the amount of said debts was more than the amount of the assets which he received. We do not think these facts could be proved under the allegations in the declaration. In a case of this sort, where one partner is trying to collect money from the other, these facts should have been alleged in the declaration. It is different, in our opinion, from an ordinary suit of a creditor against a debtor. In a suit of the latter kind, where the statutory form is followed, the requirement

that the *allegata* and *probata* shall correspond is not so strict. This evidence being properly ruled out, there was not sufficient evidence left to authorize the jury to find for the plaintiff, and the court therefore did right in directing a nonsuit. We think, however, that the plaintiff has merit in his case, and we therefore direct that if he will amend his declaration properly, he be allowed, upon motion, to reinstate his case and have a trial upon the merits thereof, and that the defendant also have leave to file pleas in the case.

*Judgment affirmed, with direction.*

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THE CHATTAHOOCHEE BRICK COMPANY v. SULLIVAN.

1. The charge on the subject of damages, complained of in the 5th ground of the motion for a new trial, was correct, and in view of the evidence was sufficiently definite and comprehensive.
2. In stating to the jury what the parties respectively insist upon, the court is to be understood as referring to their contention at the time of the trial as parties, and not to their evidence as witnesses. What the court states on this subject in the charge will be taken as correct unless the contrary appears.
3. The testimony furnished *data* upon which the jury could estimate the amount of damages resulting from lost time, at least the minimum if not the maximum amount of such damages.
4. Instructions to the jury literally correct as to admissions made in a written agreement of the parties, will not needlessly be construed as ruling on admissions elsewhere made in the pleadings or the evidence.
5. Where it did not appear from the declaration that certain items to which the evidence refers were embraced in a much larger round sum admitted in the declaration, and where the court charged with reference to these items upon the evidence alone, making no reference to the declaration, the attention of the court should have been called by counsel to the admission therein of the larger sum, and a suggestion made that it covered the controverted items, if such was the fact.
6. It was at most a mere irregularity to allow the written charge of the court to go out with the jury; and this not being objected to at the time, it is no cause for a new trial. Whether it is not the better practice in some cases, if not in all, *quære?*
7. Where there is no evidence as to the character of witnesses, a charge to consider the character of each witness, is irrelevant;

but an irrelevant charge not calculated to be more hurtful to one party than the other, is generally no cause for a new trial. In this case there was no reference to the personal knowledge of the jurors. If there had been, whether previous decisions as to that question ought to be overruled, *quære?*

8. The court erred in charging the jury to look to the reasonable cost of the work on four miles of the railway as a measure of deduction from the agreed price to be paid the plaintiff per mile, but as the error could not have occasioned any excess in the verdict beyond one hundred dollars, the case need not be tried over if the plaintiff will write off that sum from the verdict together with the interest recovered on that much of the principal.
9. The newly discovered evidence being cumulative, and due diligence as to some of it not having been exercised, it is no cause for a new trial.

October 17, 1890.

Damages. Charge of court. Evidence. Admissions. Practice. Witness. New trial. Before Judge VAN EPPS. City court of Atlanta. December term, 1889.

The petition of Sullivan alleged, in brief, that in 1888 he contracted with the Chattahoochee Brick Company for the laying of fifty-seven miles of railroad track and surfacing the road-bed of the railroad from Rome, Ga., to within ten miles of Chattanooga, Tenn., for \$300 per mile, the brick company agreeing to furnish all material needed for the work and provide transportation for the same to the point of work, and that after March 1, 1888, the road-bed should be graded and all the trestles built ready to receive the track as fast as petitioner would need it for laying track from both ends of the fifty-seven miles; that he prepared to execute his part of the contract at the time agreed upon, but the brick company failed to have the road-bed ready for him until about April 10, 1888; that nevertheless he entered upon the discharge of his duties under the contract, and after much delay and hindrance caused by the failure of the company to carry out its obligations, he did, by June 25, 1888, complete the lay-

ing of the track he had agreed to do, for which he was entitled to receive of it \$17,100; that he performed other work and services for it at its special instance and request, consisting in building and putting in at different points on the railroad ninety-five cattle-guards, amounting to \$1,187.50, excavations for these guards of the value of \$119.70, grading highway road-crossings, and grading and levelling road-beds in advance of track-laying, etc., \$1,169.30, and furnishing boat-spikes, \$32.80; that, in addition to this, the company failed to supply him with sufficient cross-ties to lay its track, and at its instance and request he laid rails upon thirty-one miles with fewer cross-ties than were required by the specifications, and afterwards, at its instance and request, put in other ties upon the thirty-one miles, at a cost to him of \$1,634.25. He further alleged that he was damaged by delays in the work, caused by the failure of the company to have its road-bed ready, etc., at various times set out in his declaration from March 29, 1888, to June 21, 1888. So that the entire indebtedness of the company to him would amount to the sum of \$24,051.89, except for certain credits to which it was entitled. These credits consisted of the following items: cash paid to it by him, \$9,152.51; for services of locomotive engineers and fireman, \$960.50; for amount paid J. Cavender for cattle-guards, \$750.00; amount paid J. D. Stevens for hauling cross-ties, \$132.70; for timber and framing thirteen cattle-guards, \$95.25; for amount paid J. D. Beard on salary, \$38.34; the whole of the credits amounting to \$11,119.30.

The plea or pleas filed by the defendant do not appear in the record. During the progress of the trial, agreements were made between the parties, by which the matters in dispute were simplified and lessened. The following items claimed by plaintiff were admitted by defendant:

Track-laying on 52.6 miles from Rome and Decatur junction north, at \$300 per mile	\$15,780 00
95 cattle-guards, \$12.50 .....	1,187 50
Grading highways, crossings, etc.....	1,084 66
6 kegs spikes.....	32 80
Retieing 31 miles.....	1,550 00
<b>Total .....</b>	<b>\$19,634 96</b>

The following items claimed by plaintiff were denied by defendant:

For track-laying from Rome to junction, ad- mitted to be four miles, at \$300.....	\$1,200 00
Excavating for 95 cattle-guards.....	119 70
Watching gaps.....	169 30
All claims for delays set forth in declaration and amendments, amounting to.....	2,808 35
<b>Total .....</b>	<b>\$4,297 35</b>

The following items claimed by defendant were admitted by plaintiff:

1888.

April 20....	\$ 150 00
“ 27.....	650 00
May 4.....	700 00
“ 12.....	1,000 00
“ 21.....	1,500 00
“ 26.....	700 00
“ 31. Bates.....	20 00
June 9. Stephens.....	203 66
“ 20. Hamilton.....	149 50
July 10. Foster.....	9 60
“ 10. Worsham.....	23 10
“ 16. Stephens.....	50 00
“ 18.....	1,035 00
“ 18. Beard.....	34 84
“ 24. Stephens.....	50 00
“ 25. Cavendar.....	750 00
Aug. 7.....	1,000 00
“ 9. Stephens.....	499 00
“ 9. 13 cattle-guards.....	108 25
“ 9. Alexander.....	99 00
“ 9. Engineer, etc.....	1,047 25
<b>Total (as stated in record).....</b>	<b>\$10,143 50</b>

The following items claimed by defendant were denied by plaintiff.

1888.

May 12.	Amt. paid Wingfield & Allen.....	\$ 60 00
June 7.....		1,200 00
" 9.	J. A. Crayton.....	200 00
" 20.	Baker.....	745 00
July 10.	D. A. Crayton.....	103 45
Aug. 9.	Alexander, \$235.75 less \$99 ad- mitted.....	136 75
	Labor of convicts.....	7,176 33

Total ..... \$9,621 53

The evidence introduced upon both sides was quite voluminous, entering much into matters of detail, so that it is possible to give only a brief statement of portions of it bearing upon the matters left in dispute. Upon the question as to how many miles the track of plaintiff covered, the testimony for plaintiff tended to show that it extended from a point twenty miles south of Chattanooga to Rome, a distance of fifty-seven miles, for which he was to be paid, under the contract, \$300 per mile. In his testimony he stated that his average profit per mile was about \$25. The four miles in dispute between the parties plaintiff did no actual work upon, but this work was done by certain convicts under direction of defendant, as will hereafter appear, but plaintiff claimed and his testimony tended to show that his contract covered the four miles, and that defendant was not released from its obligations to pay him, but was entitled to a credit for the convict labor. Upon this point the testimony for defendant tended to show that these four miles were not covered by plaintiff's contract, but the work upon them was done entirely by it and it was not indebted to him anything with regard to them.

Upon the subject as to when plaintiff should begin

work under the contract, and had the right to expect the road-bed to be in such condition as to enable him to proceed with his work uninterruptedly, there was direct conflict. The evidence for the plaintiff tended to show that this time was no later than on or about the 29th of March, 1888; while on the other hand, the testimony for the defendant tended to show that there was no specific time agreed upon.

Upon the subject of delays for which defendant was responsible, the testimony for the plaintiff tended to show that the delays were at such times and from such causes, substantially, as claimed in his declaration, except that it appeared that the delay at Tryon Factory was caused by a legal process, for which it did not appear that defendant was responsible. It further tended to show that some of the men in his employment received wages by the month, while others (the larger number of his employees) were day-laborers; that generally, during these delays, his whole force had to be kept together and paid in order to prevent his hands from scattering; and that for various reasons, such as the condition of the weather, lack of full tying of the track, lack of work which could not be done profitably, and the fact that hands of plaintiff were kept waiting from day to day by promises made on behalf of defendant, but little could be done by the hands. The testimony for the defendant, on the other hand, tended to show that during these delays the day-laborers in plaintiff's employment were not paid by him; that they were not used in bringing up back work, such as surfacing the track and the like, at which they could have been profitably employed, and at which it was customary to employ a force during such delays, and that much of the delay and bad management of the work were caused by plaintiff being intoxicated, etc. Plaintiff admitted that he was intoxicated at times, but his testimony



tended to show that this did not occur at such times as to interfere with his management of the work. The testimony for defendant further tended to show that after plaintiff had completed laying the track, it was found that much of it was not laid according to the contract, so that a great deal of work in the way of surfacing, etc. had to be done upon it; and that up to the 9th of August or at any other time about that date, nothing was said by plaintiff to the representative of defendant about blame for delay or damages.

The testimony for plaintiff tended to show, that he was entitled to be paid for employing persons to watch cattle-gaps, while the testimony for the defendant tended to show that much if not all of this claim was unfounded. The testimony for plaintiff further tended to show that he was entitled to be paid for excavations made for cattle-guards, as claimed by him in the declaration; while on the other hand, the testimony for defendant tended to show the contrary.

As to the credits claimed by defendant and denied by plaintiff, the testimony for defendant tended to show that it was entitled to the amount paid Wingfield and Allen, because it was for framing cattle-guards which it paid for, and which were embraced in the ninety-five cattle-guards for which plaintiff claimed payment of it; it was entitled to the credit claimed for the amount paid D. A. Crayton on July 10th, for a similar reason, and to the credit claimed for the amount paid J. A. Crayton on June 9th, for a similar reason; and that it was entitled to a credit for the amount claimed to have been paid Alexander on August 9th, for a similar reason. As to these credits (except \$99 in the Alexander transaction) the plaintiff testified that he knew nothing of them. His testimony tended to show that they were credits which should not be allowed against him.

Upon the subject of the labor of convicts, the evi-

dence for plaintiff tended to show that, without his knowledge, the defendant put convicts to do work which was covered by his original contract; that when he remonstrated on the subject, he was told that it was done because there was some trouble among the men in his employment, and it was thought by defendant he would not be able to get his work through in time; that he was told by persons authorized to represent defendant, that it could do the work cheaper than he could, and what profits there would be in it of course it would be willing to give to him; that it would put these men on and do the work and would not charge plaintiff anything but the cost of doing it, and he replied that if it would cost him nothing but the actual cost of the convicts on the work, he was satisfied to let them go ahead; that he never made an arrangement with defendant by which he was to pay it at the rate of \$1.25 a day for these convicts; that the agreement was that defendant was to go ahead and do the work, and whatever it cost it would charge plaintiff; that there was never anything said to him about \$1.25 per day until after the work was completed, when the defendant presented its claim to him, and he objected to it at the time. Upon the other hand, the testimony for defendant tended to show that its claim as to the amount due it for the convict labor was correct; that plaintiff was drunk and neglecting his work; that his hands had struck because they were not paid; that it was necessary for defendant to put a force to work in order that the work should be completed within the time by which plaintiff had agreed to finish it, or else defendant would have had a heavy forfeit to pay; that the situation was discussed with plaintiff, and it was agreed that the convicts should be put to work at \$1.25 per day for the convicts and \$2 per day for foremen, and plaintiff should be charged for the days they worked; that plaintiff consented to

this arrangement, appeared to be gratified at it, and defendant told him to go on just under the same terms, that it would charge him as above stated per day, and then credit him with \$300 a mile just as he was getting credit on the other arrangement; that when the account was presented to him after the completion of the work, he did not object to it; and that the convicts cost about seventy cents each per day, guards were paid \$1 per day, and foremen about \$2 per day; and the number employed was stated.

Much of the testimony in the case was upon the subject of credits claimed by defendant for payments made to plaintiff, and principally upon the credits of June 7, \$1,200, and June 20th, \$745. Upon this subject the testimony for defendant was positive that it paid to plaintiff, through Bates, \$950 of the amount for which it claimed credit under the date of June 7th, although it did not produce his receipt for this sum; and it was equally positive that it paid to plaintiff, through Bates, the \$745 claimed as a credit under date of June 20th; and that \$200 of the item of June 7th were paid at plaintiff's request to Stephens, this amount of \$200 probably being covered by the amount claimed by it and admitted by plaintiff as the amount paid Stephens under date of June 9th. The testimony for plaintiff tended to show that of these two amounts, to wit, \$1,200 and the \$745, he may have received \$740 or certainly no more than \$840, he was uncertain which.

The jury found for the plaintiff \$4,237.17 principal, with interest and costs. The defendant moved for a new trial upon the following grounds:

(1-3) Verdict contrary to law, evidence, etc.

(4) Error in charging: "The burden is on the plaintiff to satisfy your minds as to the number of miles of track-laying his contract embraced. He insists that it covered all the way from Rome to Redmond's section.

The defendant, on the contrary, insists that under the terms of the contract as finally understood and agreed between the parties, the plaintiff's part only extended from the Rome and Decatur junction to Redmond's section. This is a simple issue of fact to be decided by you in the light of the evidence, and of all the facts and circumstances of the case as disclosed. If you find this issue with the plaintiff, you will give him an additional credit of \$1,200, of course subject to a counter-charge for the reasonable cost of the work. If you find it with the defendant, you need take no further notice of it, as it is covered under the agreement."

(5) Error in charging: "If you believe from the evidence that the defendant agreed with the plaintiff to furnish all the material, and to carry it to the point of work, and that on and after the first of March the road-bed should be graded, and trestles built ready to receive the track as fast as plaintiff would need the same for laying the track from both ends, and that plaintiff put himself into position to carry the work forward with a reasonable force of hands proportioned to the work to be done and the time it was to be done in, and that defendant broke its contract and did not have its road-bed graded and its trestles built as fast as plaintiff demanded the same for carrying out his own contract with them, and that thereby his force of hands were necessarily and unavoidably kept idle, and the plaintiff suffered damage from this cause, he would be entitled to recover therefor. It would be the duty of the plaintiff, if you find the contract as he insists it was, to so employ his hands as to diminish his damages as much as possible, and to avoid damage if he could by the exercise of reasonable diligence. If there was work on the other parts of the road within his contract which he could employ them on, he would be bound to do so; and if he suffered loss by his own negligence or inattention, he could not recover therefor."

(6) Error in charging: "The defendant insists that the contract was, that they would finish the work which Mr. Sullivan had to do, with convict labor, charging him for laborers \$1.25 per day, and foremen or bosses \$2 per day, and would allow him the difference between that and \$300 a mile. Mr. Sullivan insists that the contract was, that he was to be charged only what the labor done by the convicts cost the defendant, and that they were to allow him the difference. Now if you believe from the evidence that the defendant was to pay the plaintiff the difference between the actual cost of the convict labor to them and \$300 a mile, for the part of the road on which they entered with these convicts within Mr. Sullivan's contract, you would ascertain from the evidence what this cost was, and charge him with only the actual cost."

(7) The testimony did not show what part of the time, if any, during delays, was actually lost by the force.

(8) The court erred after having read his charge to the jury, in giving his charge, which was in writing, to the jury, who had it with them in their room during their consideration of the verdict, and until the verdict was rendered. (Note by the court: The charge necessarily covered many items and statements of amounts in figures, such as no mind could have carried in memory from hearing them once read. It was necessary for the jury, doing the work of an auditor as they were in this case, to have the charge in shape where they could get it in their deliberations upon each item as it arose.)

(9) Error in charging: "Mr. Sullivan insists that the contract was, that he was to be charged only what the labor done by the convicts cost the defendant, and that they were to allow him the difference."

(10) Because of newly discovered evidence.

(11) Because, when speaking of the agreement made

by the parties pending the trial, as to admitted and contested items, the court charged the jury as follows: "You should credit plaintiff with what is admitted in this agreement to be due him, and charge him with the amount admitted to have been received by him, that is, credit him with \$19,634.96 and charge him with \$10,143.50." Defendant insists that this amount limited the amount admitted by the plaintiff to the \$10,143.50, and prevented the jury from considering all of the \$9,142.51 cash admitted in the declaration, and by plaintiff's testimony.

(12) Because the court, when speaking of the credits for \$950 and \$745 claimed by defendant, erred in charging as follows: "If you are satisfied from the evidence that Mr. Sullivan got these sums or either of them, or any part thereof, you should charge him with the amount he actually received. If you are not so satisfied, you will disallow them." Testimony was offered by both parties as to these two items, and defendant insisted that they were embraced in the \$9,142.50 admitted by plaintiff, and for that reason should be allowed. This charge confined the jury to the evidence and excluded consideration of the admission in the declaration, and it allowed the jury to find against plaintiff's admission, as a witness, that he got part of the \$950.

(13) Because the court erred when, in speaking of the credibility of witnesses, he charged the jury to consider "the character of each witness and his opportunity to know the facts about which he testifies." There was no testimony as to the character of any witness.

In support of the ground as to newly discovered evidence, the defendant produced a receipt signed by plaintiff, and dated June 9, 1888, acknowledging the receipt from Bates, superintendent for defendant, of \$950.

Also the affidavit of one Schafer, who during 1888 was employed as an engineer to lay track for Sullivan. This affidavit was to the effect that when the convicts were put on the work, Sullivan's men were on a strike and had been for a week, because they had not been paid; that it was rumored in the camps and on the works that Sullivan was in Chattanooga on a spree, and when he came upon the work he had the appearance of one who had been on a drunken spree; that affiant was present every time the hands were paid off on a portion of the work, covering several of plaintiff's claims for delays; and the day-laborers were never paid for lost time or for the time they were not at work; that during the delays at Cabin Creek and Summit Cut, there was plenty of surfacing, back-spiking and lining, etc. to do, and the force was kept employed at these; and that sometimes during delays, the weather would be bad so that the hands could not have worked if there had been no delay from other causes. Also the affidavit of the engineer who ran the construction-train for plaintiff when he was laying a portion of the track in question. This affidavit was to the effect that the construction-train brought material for track-laying faster than it was used, and no delay was caused for lack of material at any time while affiant was working for Sullivan; that Sullivan claimed he was short of hands, and affiant knew that material would so accumulate that a train going out on Friday would not go back with another load until the following Tuesday; that the day-laborers were not paid except for the actual time put in by them; and that there was no necessity for any hands to be idle, for there was plenty of work to do in putting in lacking ties, surfacing, etc. Also the affidavit of one of the jurors who tried the case, to the effect that his hearing was impaired; that he tried to hear what was said on this trial, but could not say whether he did

hear it all; and that he can read common, plain writing on familiar subjects, and examined the charge of the judge in this case, but some parts of it he could not read sufficiently to make sense of it. Also the affidavits of W. B. Lowe and J. W. English to the following effect: English is president of defendant, and Lowe one of its directors having charge of the work in question. Lowe had charge also of the preparation of this case, and prior to the trial searched for receipts given by plaintiff for money paid him. He searched in all the places where such papers were kept by the company and its officers and agents, and produced on the trial all such as he could find. He searched for the receipt for \$950 given by Sullivan to Bates on June 9, 1888; and after diligent search in every place where it was likely to be or where he had any hope of finding it, he failed to find it. Since the trial, in looking over some old papers that had been considered of no value, and were not in the usual or proper place for valuable papers, he did find it. Neither he nor English knew, until after the trial, that the facts stated in the affidavits above mentioned could be proved by the affiants, and they believed each of the affiants to be reputable and worthy of credit. The attorneys for the defendant also made affidavit that they had no knowledge where the receipt of Sullivan for the \$950 was, until after the trial, and that they did not know, until after the trial, that the facts stated in the affidavits above mentioned could be proved by the affiants.

The motion was overruled, and defendant excepted.

JOHN L. HOPKINS & SON and CANDLER, THOMSON & CANDLER, for plaintiff in error.

DEAN & SMITH and CALHOUN, KING & SPALDING, *contra*.  
BLECKLEY, Chief Justice.

The facts appear in the official report.



1. There was no error in the charge of the court set out in the fifth ground of the motion for a new trial, which instructed the jury that if they found a certain state of facts by which the plaintiff suffered damage, he would be entitled to recover therefor. The point is made that the court gave the jury no rule for determining the kind of damage or for measuring the amount. Of course the charge is to be applied to the evidence, and that shows that the damage consisted of the plaintiff's expense incurred pending certain intervals of time during which the plaintiff could not proceed with the work by reason of the failure of the defendant to have ready for his use preliminary work which was essential. The evidence also furnished material from which the amount of the damage could be computed by the jury. It is said also that, if the delays occurred, it was the plaintiff's duty to keep his hands engaged on "back work," and that he was not bound to pay, and never did pay, his laborers when they were kept idle by delays; also that testimony was introduced on this question, and that the court withheld from the jury that part of the defence and the testimony relating to it. This criticism is met by the clause of the charge which made it a condition of recovery that the defendant should have broken its contract and that *thereby* the plaintiff's force were *necessarily* and *unavoidably* kept idle, and that the plaintiff suffered damage from this cause. Had more specific instructions been desired, the attention of the court should have been called to it by way of request to amplify and particularize.

2. The sixth ground of the motion for a new trial takes issue with the court as to what was or was not insisted upon by the plaintiff and the defendant respectively. We understand the court to mean that each party insisted upon something at the trial, and that what each insisted upon was thus and so. This state-

ment must be taken here as correct, inasmuch as the judge neither certifies that it is incorrect nor that he was requested to vary or modify it. The same may be said of the ninth ground of the motion, which makes a like criticism upon the charge of the court as to what the plaintiff insisted upon. It seems to be thought by the learned counsel for the defendant (the plaintiff in error here) that the court was endeavoring to make a summary, not of the plaintiff's claim, but of his testimony. We see nothing to indicate that the court was attempting, in this part of the charge, to follow the plaintiff as a witness, but only to state his position as a party. It was for the jury to determine whether or not what he insisted upon as a party was supported by his own or any other testimony.

3. The seventh ground of the motion states that the testimony did not show what part of the time, if any, during delays was actually lost by the force. We think the evidence affords *data* upon which to make a fair computation of the amount of damages resulting from lost time; at all events, that the minimum, if not the maximum, of loss could be ascertained.

4. The eleventh ground of the motion excepts to the court's charge touching the agreement of the parties made pending the trial as to admitted and contested items, the court saying: "You should credit the plaintiff with what is admitted in this agreement to be due him, and charge him with the amount admitted to have been received by him, that is, credit him with \$19,634.96, and charge him with \$10,143.50." The complaint is, that this limited the amount admitted by the plaintiff to \$10,143.50, and prevented the jury from considering all of the \$9,142.50 admitted in the declaration and the plaintiff's testimony. This criticism is altogether unfounded. The court was charging specifically upon the agreement made at the trial, and its effect as to two ag-

gregate sums, the one to be placed on one side of the account, and the other on the other side. Surely what the court said was literally correct, and to our minds it would carry no implication as to how any item or items not included in the agreement were to be dealt with. It is not pretended that an express negative was put upon the allowance of any sum admitted in the declaration or, in the plaintiff's testimony, and to imply such a negative, the jury would have to place upon the court's language a strained and distorted construction. We do not mean to say that the agreement itself would not bear that construction, for we rather think it would, so far as any admissions in the declaration are concerned, one of the purposes of the agreement seeming to be to group together all the admitted and disputed items for and against each party. We can discover no clear reason why the court, the counsel and the jury should not have looked to the agreement for all the material, or rather for a description of it, out of which the full account between the parties was to be constructed. But what we rule is, that this part of the charge was not erroneous.

5. The twelfth ground of the motion complains that the court charged in a way to exclude from the consideration of the jury the effect of an admission made in the declaration upon certain items, one for \$950, the other for \$745, claimed by defendant. If either of these items was included in the admission of the gross sum of \$9,142.50 set out by the plaintiff in his declaration, we think the attention of the court should have been called to that fact. It does not appear that the court knew or was informed that these items entered into that gross sum, or that the defendant claimed that such was the fact. The court, thinking no doubt that the question of the allowance of these items turned on the evidence and not on the pleading, instructed the

jury accordingly, and if they were in fact covered up and comprehended in a larger sum, so as not to be recognizable without an examination of the pleadings, why did counsel remain silent and forego the benefit of an admission which, as now suggested, was contained in the declaration itself? We can find no such admission in the declaration, that is, none which identifies these items as matters included in the gross sum of \$9,142.50 designated in the declaration as cash paid by the defendant to the plaintiff, without the specification of any particulars. The declaration is silent as to particulars.

6. According to *Gholston v. Gholston*, 31 Ga. 625, it was not correct practice to send out with the jury the written charge of the court read to them from the bench. There is no statutory provision in this State on the subject, and that being so, were we to follow the rule which prevails in some jurisdictions, we could hold the matter subject to the discretion of the court. 2 Thompson on Trials, §2583. The reason given by the trial judge for allowing the charge to go out in this instance, was that it had in it many statements as to amounts, etc., which the jury could not remember and for which they would want to make reference to the charge. We find this to be so, and as no objection was made by counsel to sending the charge out, we think it is no cause for a new trial. Indeed, some of us regard it as a wholesome practice for every case. But we all agree that at most it is only an irregularity, and that the omission to object was a waiver of objection. *Bass v. Winfry*, 20 Ga. 634, opinion by BENNING, J.

7. It is complained that the court charged the jury, in speaking of the credibility of witnesses, to consider the character of each witness and his opportunity to know the facts about which he testifies. There was no testimony as to the character of any witness. For this

reason the charge, while it was irrelevant, could not have been more hurtful to one party than to the other. There is no cause for treating it as prejudicial to the defendant rather than to the plaintiff. It would not be sound law to grant a new trial on account of an irrelevant charge not necessarily hurtful to either party, unless it was likely to have influenced the verdict. In this case, we can see no reason for suspecting that this allusion to character had any influence whatever. Indeed, on account of certain facts in the record, the defendant has much less cause to complain of it than the plaintiff. It will be observed that the charge made no express reference to any knowledge which the jurors themselves might have touching the character of witnesses, and in this respect it differs from the cases of *Anderson v. Tribble*, 66 Ga. 584, *Head v. Bridges*, 67 Ga. 227, and *Howard v. The State*, 73 Ga. 84. We were requested to review these cases, in so far as they sanction the mere personal knowledge of jurors touching the character of witnesses as a factor in the determination of credibility. We are strongly inclined to the opinion that in this respect they are unsound, but we can make no authoritative ruling upon the question in disposing of the present case; for the charge now under examination, fairly construed, does not present the point. It was inapplicable in its terms, for the reason that there was no evidence to which the jury could properly apply it, and they were not instructed to apply it to their own information or personal knowledge. This is all we deem necessary to say on this topic at present.

8. The court erred in charging the jury as set out in the fourth ground of the motion for a new trial, in one particular, which was, after saying that if the jury found that the four miles of railway extending from Rome to the Rome and Decatur junction was included

in the contract, they would give the plaintiff credit for \$1,200, in adding, "of course subject to a counter-charge for the reasonable cost of the work." We think there was no evidence to warrant the jury in looking to the reasonable cost of the work for a measure of the correct counter-claim against this \$1,200 item. If this four miles were embraced in the contract, the plaintiff would be entitled either to the difference between \$1,200 and the cost to the defendant of doing the work by convict labor, or to the difference between \$1,200 and the price of the convict labor, as contended for by the defendant. There was evidence tending to show that the reasonable cost of the work was \$1,100, the plaintiff having testified that his profits on the work done by himself averaged \$25 a mile. If the jury followed the instructions of the court, they most probably allowed the plaintiff \$100 for these four miles. We cannot ascertain from the evidence, certainly not without a great deal of study and calculation, what it actually cost the defendant to do this work by convict labor. Nor can we make an accurate estimate of how much the convict labor, estimated at the price contended for by the defendant, would amount to for this particular part of the work. But on no basis of calculation which the evidence anywhere points out, would the cost of doing this work at the prices claimed by the defendant for convict labor, exceed \$300 a mile, the compensation which by the original contract was to be paid to the plaintiff for doing it. We think the results of the error in the charge of the court may be wholly eliminated by assuming that the jury could not have allowed, and did not allow, for this item more than \$25 per mile, as the difference between the reasonable cost given them as a standard in the charge of the court and the \$300 per mile which the plaintiff would have been entitled to receive, had he done the work himself. We think,

therefore, that if a new trial were had on account of this error, it would not involve exceeding \$100 as matter fairly in dispute, on which the error of the court could have had any influence. Rather than order a new trial unconditionally on account of this disputed item, we prefer to reverse the judgment overruling the motion for a new trial, with direction that if the plaintiff will write off from the verdict one hundred dollars and the interest recovered on that sum, the judgment, modified to conform thereto, then stand affirmed.

9. The newly discovered evidence is fairly open to the objection that it is cumulative, and to the further objection that there was no full diligence in procuring some of it in time to be used on the trial. With these infirmities, we cannot hold it good cause for a new trial. Touching the payment covered by the newly found receipt, there was evidence at the trial from both sides, and there is no certainty or even probability that the jury did not follow the defendant's evidence as to the amount of the payment, which was the same amount shown by the receipt. *Judgment reversed, with direction.*

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PATTERSON v. THE STATE.

1. The witness not being an expert, his opinion that from the manner of the accused and from all the circumstances surrounding the transaction, the accused acted under an insane delusion and was impelled by an irresistible impulse, was not competent evidence.
2. In deciding a legal question touching the admissibility of evidence, the court may assign reasons for the decision in the hearing of the jury or forbear to do so at discretion.
3. The indictment being for an assault with intent to murder, and there being nothing in the evidence to reduce the act to the minor offence of stabbing, nor to suggest the question of manslaughter if death had ensued, it was not incumbent upon the court to submit the law of stabbing or of manslaughter to the jury.
4. The other special grounds in the motion are not cause for a third trial, the second verdict being a necessary outcome of the evidence under the law of the case.

October 17, 1890.

Assault with intent to murder. Criminal law. Witness. Evidence. Stabbing. Manslaughter. Charge of court. Verdict. Before Judge RICHARD H. CLARK. Fulton superior court. March term, 1890.

Patterson was indicted for assault with intent to murder. Upon a second trial the testimony for the State tended to show that one Dodgen and the defendant's wife, without previous arrangement, went on the same car to a park; that they left the car, and while walking at a public place in the park, at six or seven o'clock in the afternoon of a summer day, were met by the defendant; that the three conversed for a few minutes pleasantly, when the defendant remarked to Dodgen that he wanted to have a private conversation with his wife, and Dodgen "lagged back" a few steps, and they walked ahead; that there was some conversation between defendant and his wife, the nature of which does not appear, and defendant commenced stabbing his wife with a knife, inflicting upon her a number of deep and serious wounds in the back and breast; that another person ran up, and just as he neared them the defendant struck a final blow and ran away, and that upon that night he was arrested while hiding at the house of a friend. Mrs. Patterson, after suffering for some time, recovered from the effects of the wounds. She and the defendant had before this lived in the same town with Dodgen, and Dodgen met her as he would any other lady who lived in his town. The knife which defendant had when arrested was a common, small, and very dull knife. If the knife with which Mrs. Patterson was stabbed had entered immediately over the heart the depth that it entered over the spinal muscles, in one of the wounds inflicted upon her, it would have reached the heart. One of her limbs was paralyzed for a time from the injury, and afterwards she was around her room on her crutches and was eventually able to dispense with them.



The defendant introduced no testimony. He made, in substance, the following statement: He had been a number of years married, and loved his wife dearly. On the afternoon of the stabbing, he was informed that his wife had been seen to go out on a car with a man. He thought his informant was mistaken, but went out to the park to satisfy himself, having no weapon whatever except a small pocket-knife, and no intention of doing any wrong or hurting any one. After reaching the park he saw his wife and the man, and went up to them and spoke to both of them. He asked his wife to come back in town on a street-car and to walk in front with him and have a private conversation, and she refused. They walked on and Dodgen dropped behind, and defendant asked her a few questions and she answered them, and he lost all control of himself; and what followed the jury knew. He was powerless to control himself. Regretted it as much as any man, but could not prevent it. He lost all control of himself and did not know at the time what he did.

He was convicted, and moved for a new trial on the grounds stated in the opinion; and the motion having been overruled, he excepted.

R. J. JORDAN, for plaintiff in error.

C. D. HILL, solicitor-general, and MAYSON & HILL, *contra*.

BLECKLEY, Chief Justice.

1. The witness Dodgen, who is not shown to have been an expert, was asked by counsel for the accused this question: "From the manner of the man, and from all the circumstances surrounding that transaction, don't you believe that Mr. Patterson, at the time, at that particular juncture, was acting under an insane delusion; and don't you think that he was impelled to do what he did by some irresistible impulse?" The court ruled the question inadmissible, and in assigning

the reasons for his ruling, declared his opinion to be adverse to recognizing emotional or moral insanity as a defence to a charge of crime. Whether the reasons given by the court were good or not, we think the witness under examination should not have been allowed to express an opinion in answer to the question propounded. The question called upon him to perform the functions of a juror rather than of a witness. He was requested to say whether, in his opinion, "from the manner of the man, and from all the circumstances surrounding the transaction," the accused was acting under an insane delusion and impelled by some irresistible impulse. He was not even confined, as a basis for his opinion, to facts in evidence, but was asked to speak from all the circumstances surrounding the transaction, whether they were all in evidence or not. Moreover, there was no evidence whatever tending to establish an insane delusion, or any other delusion, and none from which an irresistible impulse could rightly be inferred in a man of sane mind.

2. It may be true that the court entered into more elaboration in rendering a decision upon the inadmissibility of the evidence than was necessary, but that was a matter for the determination of the judge himself. What he said was pertinent; and even if it had not been, it was a statement of the reasons on which the decision rested in the judge's mind, and his decision being correct, his reasons for it could not render it erroneous. The judge may give his reasons for deciding any legal question thus and so, and that the jury hear them, or rather overhear them, will certainly not vitiate the trial.

3. Under the evidence there were no facts which fairly raised the question of manslaughter or of the minor offence of stabbing. If the accused was guilty of anything, his offence was assault with intent to

murder. The charge of the court was correct in every part of its bearing on that offence. This being so, and the evidence being overwhelmingly in favor of the verdict, to grant a new trial because the court did not submit the law of manslaughter and of stabbing would be wholly unwarranted.

4. None of the other special grounds taken in the motion for a new trial are sufficient to work a reversal of the judgment, modified, as some of them are, by the explanatory notes of the judge. We discover nothing to indicate that the accused has not had a fair and legal trial; and this being the second verdict of guilty, we are free from all manner of doubt as to his being a proper subject for punishment. The verdict being indubitably correct, and a necessary outcome of the evidence under the law of the case, it would be only a very grave error of the court that would entitle the accused to a third trial. For the case on a former writ of error, see 85 Ga. 131; 11 S. E. Rep. 620.

*Judgment affirmed.*

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ALLEN v. THE MUTUAL LOAN AND BANKING COMPANY.

1. A declaration having been filed with the clerk of the superior court, and the case having been entered on the docket, and at the second term of court the plaintiff moving to establish a copy of the declaration and process as lost, there was no error in sustaining the motion; the plaintiff's attorney testifying that though he did not know the papers were lost, he had inquired after them and had been informed by the clerk that they were lost or mislaid, but that the clerk would get them for him, and the clerk testifying that it was his habit, directly after receiving a declaration, to annex process thereto, and while he could not say positively that he had done so in this case, he thought he had.
2. The plaintiff's attorney testifying that on his inquiry the sheriff informed him that the declaration had been served on the defendant, and that he was misled by this information and consequently did not move at the first term for an order to perfect service, it was not error to grant such order at the second term, giving until the next term to perfect service; though the court, in its discretion, could refuse such order and dismiss the case.

October 17, 1890.

86	74
87	738
86	74
120	74
86	74
124	67

Practice. Lost papers. Service. Before Judge  
VAN EPPS. City court of Atlanta. March term, 1890.

Reported in the decision.

FRANK A. ARNOLD, for plaintiff in error  
SIMMONS & CORRIGAN, *contra*.

BLANDFORD, Justice.

The defendant in error sued the plaintiff in error, and filed its declaration with the clerk of the superior court. The case was entered on the docket. Defendant in error, through its attorney, inquired after the papers and was informed by the clerk that they were lost or mislaid, but that he would get them for him. At the second term of the court, the defendant in error moved to establish the lost declaration and the process attached thereto; and on the trial, plaintiff's attorney, having testified as to his inquiry regarding the papers in the case and his being assured by the clerk that he would get them for him, stated that he did not know they were lost. Defendant in error also showed by the clerk that it was his habit, directly after receiving a declaration, to annex process thereto; and while he could not say positively he had done so in this case, he thought he had. The court allowed a copy to be established in lieu of the original declaration and process, and this the plaintiff in error, Allen, says was error. We see no objection to the court's having ordered the declaration and process to be established upon the evidence submitted.

The next question made is, that at that term of the court plaintiff moved for an order giving further time, until the next term of the court, within which to perfect service of the declaration and process on the defendant, now the plaintiff in error. It was shown by the evidence of plaintiff's attorney that he inquired of the sheriff, who informed him that the declaration had

been served upon the plaintiff in error; that he was misled by this information given him by the sheriff, or he would have moved for this order at the first term of the court after the declaration was filed. The court allowed the order asked for, and Allen, the defendant in the court below, excepted. He says this was error. While we think the court could have refused the order and dismissed the case, yet we think he had a right to hear the testimony produced by the plaintiff in the court below; and if he was satisfied that the plaintiff had used due diligence to ascertain whether the declaration and process had been served, he then had a right to order the service to be perfected as was done. The granting of such a motion is largely in the discretion of the court. And while this court might not interfere with the court below whether it directed that further time should be given or refused, still we do not think it was error to have allowed the order asked for.

*Judgment affirmed.*

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THE RICHMOND AND DANVILLE RAILROAD CO. v. DAVIS.

The action being to recover damages for the homicide of the plaintiff's husband, alleged to have been caused by the negligence of the servants of the railroad company in moving an engine against a car upon which he was at work, by which he was thrown from a ladder and injured so that he died, and the evidence being conflicting upon whether his death was caused by the injury so received or by a disease not consequent upon that injury, and the jury having been properly instructed as to the law governing the case, and having found in favor of the plaintiff, and there being sufficient evidence to authorize the verdict, and the court below being satisfied not to disturb it, this court will not interpose to grant a new trial.

October 17, 1890.

Negligence. Verdict. Railroads. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

Reported in the decision.

JACKSON & JACKSON, for plaintiff in error.

J. T. GLENN and J. M. SLATON, *contra*.

BLANDFORD, Justice.

The verdict having gone in favor of the plaintiff in the court below, the railroad company (who is the plaintiff in error here) moved the court for a new trial, mainly upon the ground that the verdict was strongly and decidedly against the weight of the evidence and without evidence to support it. The action was brought by the defendant in error to recover damages for the homicide of her husband, whom she alleged was killed by the carelessness and negligence of the servants and agents of the railroad company in moving an engine against a car upon which deceased was at work at the time, by which he was thrown from a ladder and received the injuries from which he died. The court refused the motion for a new trial on the part of the railroad company, and it excepted.

“When doctors disagree, who shall decide?” The law says the jury. When they are sworn and empanelled to try a case, the law says, after they have heard the evidence, they are invested with power to determine all questions growing out of the facts submitted to them, whether they be scientific, metaphysical or technical. The law gives them, or seems to invest them, under such circumstances, with powers to discern, discriminate and determine upon all questions of fact. When thus circumstanced, they could determine whether the cause of the deceased’s death was stricture of the œsophagus, and whether this stricture was caused by dyspepsia or on account of certain acids of the stomach, or whether it resulted from certain injuries to the stomach received by the deceased in consequence of a fall caused by the negligence of the servants and agents of the railroad company. The jury could also determine whether the death of plaintiff’s husband was from ulceration of the

stomach produced by this injury received from the fall, or whether it was in consequence of disease not attributable to such injury. Under such circumstances, the law seems to leave the jury with the sagacity of Dr. Hornbook to "ken what ails them, their disease, and what will mend it." The case seems to us, from the record, to have been properly submitted to the jury by the court, who fairly stated the issues and contentions of the parties. It appears from reading the charge, that the court properly instructed the jury as to the law governing the same. The evidence in the case was conflicting upon the question of whether the husband of the defendant in error died in consequence of the injury he received from a fall caused by the negligence of the plaintiff in error, or whether the deceased died from disease not consequent upon the injury he thus received. The jury found in favor of the defendant in error, and we cannot say but that they had sufficient evidence to authorize their finding. The court below was satisfied not to disturb their verdict, and under such circumstances this court would rarely interpose to grant a new trial, unless the record showed that the verdict of the jury was the result of some improper influence. And as no such thing is shown by this record, the judgment of the court below refusing to grant a new trial is *Affirmed.*

86	78
101	542

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SULLIVAN, receiver, v. McDONALD.

Where creditors file a petition under the act of September 28, 1881, "to authorize proceedings in equity in certain cases of insolvency," and the judge acts thereon by the appointment of a receiver who takes charge of the property, one of the judgment creditors cannot be allowed, on his subsequent petition, to sell the property or any part of it under his judgment and execution, and thus deprive the court of administering the property under the provisions of the act, which contemplates that the whole estate of the debtor shall be administered by the court. If, at the time of the applica-

tion for receiver, there exist against the debtor liens sufficient to consume the entire estate, the court will not appoint a receiver. If the estate is large and the liens are of small amount, the court on proper showing may appoint a receiver; but having done so, it must fully administer the estate for the best interests of the debtor and creditors.

October 17, 1890.

Equity. Insolvency. Receivers. Liens. Debtor and creditor. Practice. Before Judge RICHARD H. CLARK. Fulton county. At chambers, July 30, 1890.

Reported in the decision.

BROYLES & SONS, for plaintiff in error.

J. B. CONYERS, *contra*.

SIMMONS, Justice.

It appears from the record in this case that in January, 1890, Williams and other creditors filed their bill, under the act of September 28th, 1881, entitled "An act to authorize proceedings in equity in certain cases of insolvency," etc., against A. C. Ladd, making the proper allegations in accordance with the act, and applying for the appointment of a receiver to take charge of his property. This petition was presented to Judge MARSHALL J. CLARKE, judge of the superior court of the Atlanta circuit, and on the 11th of January he passed an order appointing Sullivan receiver of said property and directing that as such he take charge of the same, to be held and managed under the direction of the court. On the 26th of July, 1890, G. L. McDonald filed his petition to the superior court of said county, alleging in substance that on January 11th, 1876, he obtained a verdict and judgment against A. C. Ladd *et al.*; that on the 28th of February, 1876, execution issued and was levied on certain lands and lime-kiln property of Ladd; that Mrs. Ladd interposed a claim, which was tried and the property found subject; that she moved for a new trial, which was refused by the court, and



the Supreme Court affirmed the judgment; that Ladd then filed an affidavit of illegality, upon which a trial was had and a verdict rendered in favor of the plaintiff; that afterwards, in December, 1889, Ladd presented a petition for injunction, relief, etc., praying that the petitioner's *fi. fa.* be enjoined from proceeding, and that this was refused. The petition then sets out the proceedings for the appointment of Sullivan as receiver, and alleges that Sullivan had taken possession of the property of Ladd as receiver, including the lands and lime-kiln property which had been levied on by the petitioner's *fi. fa.* And the petitioner prayed that a rule *nisi* might issue requiring Sullivan as receiver to show cause why the *fi. fa.* should not proceed to sell the property of Ladd, or enough of it to pay the *fi. fa.* The rule *nisi* was issued and served upon Sullivan, who demurred to the same on the ground that it contained no sufficient allegations, if true, to authorize the granting of the prayer thereof. This demurrer was overruled, and it was adjudged that the petitioner have leave to proceed with his execution and advertise and sell enough of the property of Ladd in the hands of Sullivan to fully pay off his claim, the balance, if any, to be turned over to the receiver, who should continue to operate the property as he was then operating it, until it should be sold by the sheriff. The receiver excepted to the overruling of the demurrer and the order granting the petitioner leave to proceed as stated. This petition was heard and acted on by Judge RICHARD H. CLARK, judge of the Stone Mountain circuit, in the absence of Judge MARSHALL J. CLARKE, judge of the Atlanta circuit.

Under these facts, we think the judge erred in granting leave to McDonald to sell the property or any part thereof which prior thereto had been placed in the hands of a receiver of the court. We think that where

creditors file a petition under the act of 1881, *supra*, and make the proper allegations therein, and the judge acts thereon by the appointment of a receiver who takes charge of the property, he cannot afterwards, upon the petition of one of the judgment creditors, allow such creditor to sell the property or any part thereof under his judgment and execution, and thus deprive the court of administering such property under the provisions of the act. We think the act contemplates that when the court appoints a receiver and takes charge of the property of the debtor, the whole estate of the debtor shall be administered by the court. The act prescribes that it shall be in the power of the court, under the creditors' bill, "to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader." . . . "And the assets shall be divided *pro rata* among the creditors, preserving all existing liens." The act also gives the judge power to make a suitable allowance for the debtor pending litigation, and authorizes him on final judgment to recommend the discharge of the debtor from all his liabilities. It was doubtless the intention of the legislature in passing the act, to bring all the assets of the debtor into a court of equity, so that the court might fully administer upon the estate of the debtor. The court is to order the property sold at the proper time by its receiver, and the proceeds of the sale brought into court and paid out according to the priority of the claims against the debtor. Nor does it matter, in our opinion, that there are existing liens against the debtor when the application is made to the court for the appointment of a receiver. If these liens are sufficient to consume the entire estate, the court will not appoint a receiver, as was decided by this court in *Barnwell v. Wofford*, 67 Ga. 50, and in other cases subsequent thereto. If the estate is large and the liens are of small amount, the

court, upon a proper showing, may appoint a receiver, and when it does so, it must fully administer the estate for the best interests of the debtor and the creditors. We do not think the court could properly administer the estate of the insolvent debtor if each judgment creditor having a small judgment against the debtor were allowed to interfere with the administration by selling the property piecemeal. It appears from the record in this case that Ladd was indebted some \$25,000, and that his estate was very valuable, but was not sufficient to pay off this large indebtedness; it also appears that the judgment lien of McDonald was for \$366.26 principal, besides interest. To allow McDonald to sell such a large amount of property under this small execution, would interfere very greatly with the proper administration of the estate by the court, and might be calculated to injure a large number of other creditors. Moreover, the record discloses that there were other judgment creditors besides McDonald; and it does not appear whether McDonald's judgment is older than the other judgments. If one creditor having a lien be allowed to sell a portion of the property, why may not the other lien creditors do likewise, and thus take the estate out of the hands of a court of equity and put it back in a court of law? The whole amount of the liens may not in this case amount to more than \$1,000, and yet, according to the contention of counsel for the defendant in error, the value of the estate may be frittered away by successive sales of portions thereof under these small liens. This would seriously interfere with the proper administration of the estate by the court. The proper construction of the act is, that where there are not sufficient liens to exhaust the estate, the court in a proper case made should take charge of the estate and administer it, selling it at the proper time, and bring the money into court and divide it according to law.

*Judgment reversed.*

THE MACON AND ATLANTIC RAILWAY COMPANY *et al.* v.  
THE MACON AND DUBLIN RAILROAD COMPANY.

The terminal points of a railroad company chartered under the general law (code, §1689 *et seq.*) being Macon in Bibb county and Dublin in Laurens county, and the terminal points of another railroad company subsequently chartered under the same law being Sofkee in Bibb county and Savannah, and the former not having constructed its road-bed by about thirteen miles, it was error to enjoin the latter from constructing its railroad within ten miles of the road-bed of the former; the legislative intention in section 1689(t) of the code being to apply the same to a new railroad chartered under this law, where there was another railroad which had already been constructed at the time of the passage of the act; and the words "now constructed" and "already constructed" in that section meaning one and the same thing.

October 27, 1890.

Injunction. Statutes. Railroads. Before Judge ROBERTS. Twiggs county. At chambers, August 7, 1890.

Reported in the decision.

GUSTIN, GUERRY & HALL and CLIFFORD ANDERSON, for plaintiffs in error.

W. M. WIMBERLY, BACON & RUTHERFORD, J. M. STUBBS, J. D. JONES and L. D. SHANNON, *contra*.

BLANDFORD, Justice.

At the instance of the defendant in error, the plaintiff in error was enjoined by the judge of the superior court from making or constructing its railroad within ten miles of the road-bed of the Macon & Dublin Railroad Company. It appears from the record in this case that the Macon & Dublin Railroad Company received its charter on the 8th day of August, 1885, under the general railroad law of this State, as embraced in §1689 *et seq.* of the code; that the Macon & Atlantic Railway Company obtained its charter likewise in April, 1890; that at the time of the filing of the petition

praying for injunction, the Macon & Dublin Railroad Company had not constructed its road-bed from Macon to Dublin by some thirteen miles. So the whole question in this case turns upon the construction of section 1689(t) of the code, which is as follows: "Where a railroad or branch railroad is intended to be built under this section, between two points where a railroad is now constructed, the general direction and location of such new railroad shall be at least ten miles from the railroad already constructed, but this section shall not be construed to refer to any point within ten miles of either terminus, or to prevent said roads from running as near to each other for said first ten miles from either terminus as the interest of such company building the new route may dictate." It will be perceived that this section provides that where a railroad or branch railroad is intended to be built between two points where a railroad is now constructed, the general direction and location of the new road shall be at least ten miles from the railroad already constructed, but that this section is not to be construed to refer to any point within ten miles of either terminus, or to prevent the roads from running as near to each other for the first ten miles from either terminus as the interest of the company building the new road may dictate. The terminal points of the Macon & Dublin Railroad Company are Macon in Bibb county, and Dublin in Laurens county. The terminal points of the Macon & Atlantic Railway Company are Sofkee in Bibb county, and Savannah and a point on the Savannah river in Effingham county. It is contended that the words "now constructed" in this section of the act should be construed to mean "now being constructed" or "in process of construction"; and this point was very ably argued by counsel for the defendant in error. We, however, are of the opinion that the words "now constructed" and "already con-

structed," which appear in this section of the act, mean one and the same thing; so we are to give these words their plain and unambiguous meaning. There can be no doubt that the legislature intended to apply this section to a new railroad chartered under this law where there was another railroad which was then constructed and which had already been constructed at the time of the passage of this act. It seems to us that the words cannot bear a plainer meaning, whatever injustice may be done to a railroad company whose road-bed is in progress of construction, by this interpretation of the statute. The words are to receive their plain and obvious import; and we think the maxim *a verbis legis non est recedendum*, applies in this case. The judgment of the court below, therefore, in granting the injunction restraining the plaintiff in error from building its road-bed within ten miles of the road-bed of the defendant in error, is reversed. But we do not by this opinion intimate or decide that the Macon & Atlantic Railway Company can take, use or occupy any right of way or other property acquired by or belonging to the Macon & Dublin Railroad Company, unless condemned or purchased by the first named company, proper compensation being paid therefor. *Judgment reversed.*

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THE RICHMOND & DANVILLE RAILROAD CO. v. CHILDRESS.

BLECKLEY, C. J.—On the established principles of trial by jury the verdict was warranted by the evidence both as to liability for the injury and amount of the damages. *Judgment affirmed.*

November 10, 1890.

Railroads. Negligence. Damages. Verdict. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Childress, by his next friend, sued the railroad company for damages from a personal injury. The evidence

for the plaintiff tended to show the following: He was between eleven and twelve years old on June 4, 1887. On that day he started to Goodwin's Crossing, a place upon defendant's road where its accommodation train was accustomed to stop to let off and take on passengers. He went to the union depot in Atlanta, and was told that said train was ready, and he got on the train and went inside the door, and was holding to the door when the engine came back and struck the baggage-car of the train with great violence, which caused the baggage-car to strike the car on which plaintiff was, and he was thrown across one of the seats in the car, striking his left side on the corner of the seat, and was thrown down in the car and remained on the floor about five minutes. There was no dispute as to the fact that the blow given the car was much more severe than was proper. Plaintiff about an hour afterwards, by another train, went to Goodwin's Crossing, which was about ten miles from Atlanta, to visit his grandfather, remaining in the depot until the other train left. He felt sore, and that night had a shortness of breath, like fainting spells. Most of the next day he was in bed. He was sore in his side and had a great deal of pain, and came back to Atlanta about the fourth day. On that day or the next, he went back to Goodwin's Crossing. He could not sleep at night; suffered a great deal of pain in his side and breast; had to be propped up to breathe. About the twelfth day after the accident, an abscess which had formed in his left lung, broke, and he was brought back to Atlanta. For a long time he suffered intensely; the discharge from the abscess was enormous; his life was despaired of; he had to be constantly watched and supported in his coughing spells. He was confined to the bed and around the house four or five months. It was the next January before he went to school, but he could not stay

at school all the time, because he was not able. During that period he had pain in his breast, and he suffers pain and inconvenience from it now. The injury is permanent. It has resulted in an affection of the heart which renders it necessary that he should be kept quiet, and which will prevent his engaging in any occupation requiring severe exertion; so that it is probable his capacity to do any labor requiring much physical exertion has been lessened from one half to two thirds; in fact, it would be quite unsafe for him to engage at all in such an occupation. Before the injury he was a bright boy, strong and disposed to take part in active exercises. Since, he has been dull, indisposed to engage in the sports usual to boys of his age, weakly, and has grown but very little, his weight only increasing from about seventy-five pounds before he was injured to eighty-two pounds at the time of the trial, which was about three years after the injury. He had the measles in March, 1887, for about a week, an ordinary attack, and afterwards had a relapse with which he was troubled for about two weeks, but he was improving and gaining strength, and there was no indication of any serious physical trouble at the time he was injured. After the relapse from the measles and before the time he was hurt on the train, he had been out of the house part of the time and about on the streets as other boys. He had no pain in the breast before he was hurt, and did not have much cough with the measles at all. He struck the car-seat just above his heart. Did not faint but got up and walked out. He did not think at the time he was much hurt. He had no trouble with his lungs or pleurisy when he had the relapse with the measles, and had no physician except his father, who is a physician. When he was hurt, he was being taken to his grandfather's in the country to regain his strength, which he had not then



fully regained. He recovered from the relapse mentioned above, about the first week in April. He belonged to a long-lived family in which there was no predisposition to lung trouble, consumption, or anything of the kind. His father testified, among other things, that he thought plaintiff was permanently disabled to the extent of one half of his capacity; and another witness testified that his capacity to labor and earn money was lessened one half or two thirds. An abscess is more frequently the result of pneumonia or the relapse of measles than of a blow or physical injury, but it is not impossible or improbable that one would be caused from a blow or external violence. In the opinion of medical witnesses who examined plaintiff, the abscess in this case and its attendant results were caused by the injury he received on the train. There was external indication of the injury, a bruise right along plaintiff's ribs, etc. The plaintiff introduced mortality and annuity tables.

The evidence for the defendant tended to show that, on the afternoon of the injury, its hostler engineer had brought down the accommodation train and engine, together with another engine, to near the union depot, and had taken the other engine and put it on another track; that there was a flagman or train-hand connected with the accommodation train, who was on the train at the time it was backed down as above stated, and who was left on the train by the engineer; that this flagman, without authority, backed the accommodation train under the depot, started with the engine of the accommodation train across the crossing which ran by the depot, reversed the engine, ran it back under the depot and struck the cars, breaking down the platform of the baggage-car, and breaking the tank on the tender attached to the engine. The hostler had never seen this flagman try to run an engine before; he was not

on the engine the hostler was running, nor was he on the engine of the accommodation train until after the hostler had moved off with the engine he (the hostler) was on. While plaintiff was waiting in the depot to take the other train, his father stated to a witness that the boy complained of his leg, that was all; hurt his leg some way and got a pretty good shaking, or something like that. A physician testified that in May, 1887, he was called to treat plaintiff; understood that he had the measles and a cough, and that there was a difficulty about his breathing, swelling in his left side. He examined the boy and found the swelling in his left side just above the stomach, and thinks that swelling was caused by an effusion of *serum* inside the *pleura* cavity. The boy looked very delicate then, and looks better now. A few days after the accident, he saw the boy crossing the road in front of his grandfather's residence, with a basket, going to the orchard. A few days after that, he was called in to see the boy who had a relapse; his cough and cold and difficulty of breathing seemed to be worse; and the opinion of witness then and at the time of the trial was, that this relapse had not been caused by a fresh injury but was a continuation of that old trouble, or rather a relapse. When he was called in, he examined the boy again and found no evidence of any physical injury of any kind, except from the disease. He examined his chest and lungs, and there were no bruises or any discoloration to show that he had been struck anywhere. This was about a week before the boy got so bad off. He did not complain about the collision to witness, or about being hurt, though his father said he was hurt. Witness was treating him for a continuation of his old trouble, the shortness of breath; had noticed there was that symptom before this accident; had him propped up in bed in May on account of it, etc. Much medical testimony

was introduced for defendant, some of it being the testimony of physicians who had made an examination of the boy; and that evidence tended to show that he was suffering from no heart trouble; that he had never had an abscess; that there was no external evidence of his having received the injury; that he had some slight difficulty in breathing, which was probably the result of an attack of pleurisy or successive attacks, which had caused a thickening of the *pleura* on the outer surface of the lower portion of the left lung; that this pleurisy may have been the result of some disease, such as *pneumonia* or measles; and that it was extremely improbable, if not impossible, that an abscess such as it was alleged this boy had suffered from, could be caused by a blow or an external injury, unless it had been attended by some fracture of the ribs, although it was possible that if there had been previous inflammation a blow might have aggravated it, etc.

The jury found for the plaintiff \$5,000. The defendant moved for a new trial upon the grounds that the verdict was contrary to law and evidence, and excessive. The motion was overruled, and defendant excepted.

JACKSON & JACKSON, for plaintiff in error.

C. T. LADSON and J. T. GLENN, *contra*.

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JOHNSON v. THE STATE.

1. Where the charge is larceny from the house by stealing goods from a wholesale store, the *corpus delicti* is not established without proof that the goods disappeared by stealing rather than by sale to retail dealers in the course of business. If the goods in question were not missed from the stock, and the stock was never ascertained to be short or deficient, the presumption is they were sold and not stolen.
2. A doubtful or contradictory confession by a man of good moral character, will not warrant a conviction where the *corpus delicti* is uncertain.

November 10, 1890.

Larceny from the house. Criminal law. *Corpus delicti*. Presumptions. Confessions. Before Judge VAN EPPS. City court of Atlanta. March term, 1889.

Reported in the decision.

L. P. SKEEN and W. T. MOYERS, for plaintiff in error.

F. M. O'BRYAN, solicitor, *contra*.

BLECKLEY, Chief Justice.

1. The charge was larceny from the house. The goods, alleged to have been stolen from the storehouse of F. E. Block, were one can of oysters, one can of milk, one can of lobsters, seven boxes of sardines, thirteen boxes of ham and tongue, two bars of soap, one can of sausage and two boxes of mustard sardines, the property of said Block. The evidence established that Block had and kept such articles in his store, but it fails to establish to a reasonable certainty that any such were ever stolen therefrom either by the accused or any one else. Block testified on the subject as follows: "I cannot say that I lost the goods mentioned in the indictment. I never missed nor searched for them, nor tried to find out if I had lost them. I run a large wholesale grocery, employ about 125 hands and sell generally to the retail trade in Atlanta and elsewhere." Catlett testified: "I work for Block in this city and county. The first of last year we missed from Block's store a cheese, and Mr. Parks, another employee of Block's, and I with an officer went to search the house of our driver whom we suspected of taking it. We didn't find it, and went to defendant's house in this city, who was not at home. His wife readily agreed to aid us, although we did not tell her what we were searching for. We did not find the cheese; but in the closet, the door of which his wife opened for us, on the top of the shelf, behind a board which was nailed to the front of the shelf so as to hold

what was put on the shelf, we found a lot of canned goods, consisting of one can of condensed milk, Vienna sausage, two boxes of mustard sardines, Kennesaw oysters, etc. I believed the goods to be stolen, especially the Vienna sausage, and took them away in a gunny sack. They filled the sack about one foot high. The defendant had worked for Block in the store about one year, and had access at all times to this kind of goods. When we first went to defendant's house and told his wife we wanted to search it, she excitedly threw her keys on the floor before us. We told her that, as we had to go through a woman's fixings, a woman was best to guide us. She then took the keys and unlocked the door for us. I identified the goods found in Block's. The goods we found at Henry Johnson's consisted of 1 can of oysters, 1 can of milk, 1 can of lobsters, 7 boxes sardines, 13 boxes of ham and tongue, 2 boxes of soap, 1 can of sausage and 2 boxes of mustard sardines." It will be observed that Mr. Catlett does not testify that anything had been missed from the store except a cheese, and that had not been found. So far as appears, the stock of Mr. Block was intact as to all classes of goods found in Johnson's possession. If the stock had been short of these articles, the fair presumption is that Mr. Block or some of his numerous employees would either have known of it or could have ascertained it. There is no suggestion in the evidence that the articles were short, or that there were no means of ascertaining whether they were so or not. It is not said that Mr. Block kept no books, or that he was otherwise deficient in the usual resources of merchants for determining the kind and quantity of all goods in store. It seems highly improbable that such a number of articles could be abstracted from a single stock of goods without some of them being missed. It does not appear that a single one of them was missed either

before or after they were found in Johnson's possession. Mr. Catlett testifies that he "identified the goods found in Block's." Possibly he means that he identified them as Block's goods. But this could signify no more than that they were such goods as Block had kept in stock. Block himself testified, however, that he ran a large wholesale grocery and sold generally to the retail trade in Atlanta and elsewhere. Several of the retail dealers in Atlanta, one of whom was Mr. Karwisch, testified on behalf of the accused that he, the accused, had traded with them for a length of time, and that they had sold him similar goods to most of those found in his possession. The accused proved by two witnesses, moreover, that he was a man of excellent character, and there was no evidence to the contrary. Taking all the testimony together, we think it wholly fails to establish any *corpus delicti*. There is no certainty whatever that any of the goods traced to Johnson were stolen. The probability that Block had sold them to retail dealers before they reached Johnson, is decidedly stronger than that they were stolen by any one from his stock.

2. As to the alleged confession, we think that cannot be relied upon to supply the want of evidence as to the *corpus delicti*. "A confession alone, uncorroborated by other evidence, will not justify a conviction." Code, §3792. The wisdom of this provision of the law is well vindicated by the present case. Couch, the officer who arrested Johnson, testified that "At the station-house he confessed to Mr. Block that he stole the goods." Mr. Block, however, testified on that subject as follows: "In one conversation he twice admitted taking the goods, but immediately after stated that he bought them from Mr. Henry Karwisch. . . I cannot say positively that he said he stole the goods, or that he merely took them. I suspected somebody else had been implicated with him, and asked him who helped

him take them. He twice replied that he did it himself, and afterwards added that he bought them from Karwisch." It thus appears that what was to Couch a confession of stealing the goods, was to Block a very doubtful confession and coupled with an assertion that he bought them from Karwisch. It is not improbable that both these witnesses misunderstood the real import of his statement. At all events there is too much uncertainty about it for it to serve as a confession to make out the *corpus delicti*. Let the State first prove that Mr. Block's goods were stolen, and then it will be in order to connect Johnson with the larceny by this so-called confession, in so far as the jury may believe it correctly understood and reported. As the case comes to us in the record, there is altogether too much uncertainty as to whether any offence was committed. The good character of the accused should count for much in such a case; and we think the trial court erred in not granting a new trial. *Judgment reversed.*

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THE SAVANNAH AND WESTERN RAILROAD COMPANY *et al.*  
v. WOODRUFF

1. After railways have been connected for nearly thirty years under a special act of the legislature providing for their connection in a city with the consent of the people thereof, the people having consented by popular vote cast within the year following the passage of the act, and the connection having been made within the next year after the vote was taken, no authority can be derived from the act for holding another election giving consent to the laying of additional side-tracks or turnouts on the streets of the city by one or more of the railway companies. When the connection was completed, with the side-tracks, etc. then constructed, the power conferred by the act to encroach on the streets was exhausted.
2. A temporary injunction restraining the construction of a side-track or turnout for a steam railway in the streets of a city, may be granted at the instance of a citizen alleging special damage to his real estate located in the vicinity of the nuisance, and though the

86	94
106	46
86	94
108	692
86	94
116	79
86	94
1117	534
1117	538
86	94
121	408
86	94
123	117
123	439

evidence be conflicting as to whether he will sustain special damage or not, the discretion of the judge in granting the injunction will not be controlled unless abused.

3. It is no legal bar to the injunction that the plaintiff may have acquired his title from collateral motives, and very recently before the work complained of began or was to begin.

November 10, 1890.

Injunctions. Railroads. Statutes. Elections. Municipal corporations. Streets. Nuisances. Before Judge SMITH. Muscogee county. At chambers, June 30, 1890.

Petition of Woodruff against the railroad company and the City Mills Company, for injunction against the construction of a side-track and turnout through streets of Columbus and near his property, alleging, among other things, that the mills company is about to erect a mill, and has combined with the railroad company for application to be made, and the consent of the mayor and council to be obtained, for the construction and operation of a side-track and turnout from the main line of the railroad through the streets to the lands of the mills company, which action would be unlawful, would injure the plaintiff's property to a large extent, and would make a public nuisance, an obstruction, a source of danger, etc. The authority for so building and operating, as set up in the answers, is stated in the opinion. It was denied that the side-track would in any way obstruct the streets or injure the plaintiff's property; and it was alleged that he had a mill to which it was found necessary to lay a side-track from the main line of another railroad company, for cheap and rapid transportation of products to and from it, which track was laid and is in constant use; that the nearest railroad to the property of the defendant mills company, from which freight could be delivered or received, is that of the defendant railroad company, from which such freight must be hauled in wagons for a considerable distance, passing directly in front of the plain-



tiff's property, but this hauling would be expensive and inconvenient and would place the City Mills Company at a disadvantage when compared with others having a railroad track; that under the act of the legislature of 1857, and the consent of the people by a vote, the consent of the mayor and council to the laying of the side-track in question was formally given on the 4th of June, 1890, the day before the petition for injunction was filed; that the plaintiff owned no property near this side-track until the 3d of June, 1890, and he then knew or could have known that the survey of the same had been begun, but he purchased for the purpose of filing the petition and damaging the City Mills Company and delaying it in the erection of its mill, knowing that it would be a strong competitor of his mill. It is ninety-two feet from the side-track in question to the nearest point on his property which he claims will be injured. The injunction was granted upon the condition that the plaintiff file his bond in the sum of \$3,000, conditioned to pay all damages that might be recovered by the defendants for suing out this injunction. The defendants excepted.

PEABODY, BRANNON & HATCHER, for plaintiffs in error.

MCNEILL & LEVY and C. E. BATTLE, *contra*.

BLECKLEY, Chief Justice.

1. Without legislative authority, the city government of Columbus could not authorize the construction and use of a side-track for a steam railway over and upon the public streets of the city. *Kavanagh v. R. R. Co.*, 78 Ga. 271; *Daly v. R. R. Co.*, 80 Ga. 793. The needful authority is sought to be derived from the act of 1857, and from a vote of the citizens taken under that act in 1887. The title of the act is "An Act to authorize the connection of the Muscogee Railroad with the Opelika Branch Railroad and the Mobile and Girard Railroad, at Columbus." Under this title the

preamble and enacting clauses are as follows: "Whereas, It would promote the interest and convenience of the people of Georgia and Alabama, as well as the public generally, to connect the Muscogee Railroad with the Opelika Branch Railroad and Mobile and Girard Railroad, *Be it enacted*, That the president and directors of said roads shall have the power of connecting their said roads by extending them through the city commons and streets of Columbus, with such side-tracks, turnouts and sheds as may be necessary for the convenience of freights and passengers. Provided, they first obtain the consent of the people of the city of Columbus, upon such terms as may be agreed on, and shall be satisfactory to them." Acts 1857, p. 73. It appears from the record that the connection provided for in this act took place in 1859, under a vote of the citizens cast under the act in the previous year. Since that time the rights and franchises of the Opelika Branch Railroad have devolved upon and become vested in the Savannah and Western Railroad Company, the plaintiff in error. Looking at the title of the act of 1857 above quoted, it is manifest that the whole purpose of that act was to provide once for all for connecting the several railroads therein mentioned. In so far as side-tracks, turnouts and sheds were embraced in and constituted a part of the scheme of connection, the act comprehended and provided for them. But that scheme was executed in 1859. And it seems plain to us that side-tracks, etc. which did not become necessary for the convenience of freights or passengers until 20 or 30 years thereafter could not have been in legislative contemplation when the act was passed. The much safer and more rational construction is, that the powers conferred by the act were exhausted by their exercise and by the consequent connection of the railroads as the result of the popular vote taken in 1859.

It cannot be that the work of connecting these railroads was not fully accomplished long ago. It cannot be regarded as a continuous and progressive work, not terminated in 1859 nor even within the long period since elapsed. The title of the act of 1857 is not broad enough to cover any side-tracks, turnouts, etc. which were not necessary as a part of the scheme of connection. To bring side-tracks, turnouts, etc. within the title of the act at all, they have to be treated as belonging to the scheme of connection. Without so treating them, the act as to them would be unconstitutional. The two votes taken under this act were separated by the period of almost a generation. To apply the act to the later of the two, would be to regard the work of making a connection as prolonged for the term of an ordinary lifetime. This court said in *Kavanagh v. R. R. Co.*, *supra*: "It may be that, under this act of the legislature, a further consent of the people of Columbus might be given by them in a further vote to be taken, that such side-tracks might be laid down along said street." This was a mere suggestion of a possibility, the case then in hand not requiring any adjudication of the point. The present case brings the question directly under adjudication, and we have considered it on our responsibility as a court. Thus dealing with it, we think it should be answered unhesitatingly in the negative. An affirmative answer would require us to use the act as a mere color for authorizing a vote thirty years after the passage of the act and when a vote under it had already been taken within the next year after its passage. Our conclusion is, that the city council of Columbus had no power or authority to grant permission to the Savannah and Western Railroad Co. (plaintiff in error) to occupy the public streets with the side-track or turnout now in question.

2. In the absence of legal authority for placing and

using this structure in the public streets, the same would be a public nuisance. And under the evidence in the record, we think the judge did not abuse his discretion in granting a temporary injunction at the instance of Woodruff, the owner of real estate in the immediate vicinity. The injunction was granted upon terms, bond and security to answer for any resulting damages being required of Woodruff before the injunction would become effective. Whether he would sustain special damage or not from this threatened public nuisance, is a question for trial, under our practice, by a jury. Usually such a question may be dealt with on applications for temporary injunctions according to the sound discretion of the judge. He will not be controlled by this court, where no abuse of his discretion appears. *Cohen v. The Bank*, 81 Ga. 723.

3. The motive of Woodruff for purchasing the real estate which he seeks to protect, or the recency of his purchase, can have no influence on his legal rights as owner of the property. It is no answer by one who is about to erect a public nuisance, that the citizen complaining of special damage would not have been injured if he had abstained from making so late a purchase, or if his motive for purchasing had been more disinterested. We do not say that these matters should have no weight upon the mind of the judge in shaping his discretionary action upon the application for injunction, but only that they present no legal bar to the exercise of his discretion favorably to the applicant.

*Judgment affirmed.*

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**KIMBRELL et al. v. WALTERS' SONS & COMPANY et al.**

1. The act of 1881, Code, §3149(a), for closing up an insolvent firm of traders does not apply, the firm having been dissolved, and its business having been thereafter actually stopped by seizure of its stock in trade under legal process to its full value, some days antecedent to the filing of the present proceeding against the firm.

86	99
87	465
88	141
88	99
101	569

2. Creditors who have not reduced their demands to judgment, and who have no lien otherwise, cannot, as a general rule, under the general law, enjoin their debtors from selling or disposing of their property.
3. There being no right to enjoin the debtors themselves from parting with their property, an injunction against a creditor holding real estate as security, restraining him from restoring it after his claim is satisfied, should not have been granted.
4. In order not to interfere with that element of the case which looks to reclaiming goods, as procured by fraud in the purchase thereof, the debtors are left to stand and remain enjoined from selling or disposing of any goods purchased of these creditors.

November 10, 1890.

Injunction. Traders. Insolvency. Debtor and creditor. Practice. Before Judge RICHARD H. CLARK. DeKalb county. At chambers, April 24, 1890.

Reported in the decision.

SIMMONS & CORRIGAN, for plaintiffs in error.

No appearance *contra*.

BLECKLEY, Chief Justice.

This was a proceeding under the insolvent traders' act of 1881. Code, §3149(a) *et seq.* The judge denied the application for injunction and receiver as prayed for, but granted an injunction "restraining defendants from selling or otherwise disposing of their property until the final decree on said petition, and that M. C. & J. F. Kiser shall be enjoined from reconveying or returning the title deed he holds from ——— Kimbrell, should their mortgage claim be satisfied out of the mortgage property, or if any balance, should they be paid that balance, but to hold said deed subject to the final decree upon said petition." As all the defendants are restrained from selling or otherwise disposing of their property, this order, literally taken, would include M. C. & J. F. Kiser & Co., Mrs. Jane Kimbrell and the sheriff, all of whom acknowledged service as defendants, as well as the debtors, J. H. Kimbrell, Sr. and J. D. Kimbrell, constituting the firm of J. H. Kimbrell

Sr. & Co. We have no doubt, however, that it was the purpose of the judge to restrain only these debtor defendants from selling or disposing of their property.

1. The first question is, could this be done under the facts of the case presented in this record? J. H. Kimbrell Sr. & Co. became indebted as a firm of traders to the plaintiffs in the petition, and while so indebted, executed a mortgage upon their stock in trade to M. C. & J. F. Kiser & Co. on the 5th day of February, 1890. They dissolved their partnership on the same day, but it seems their stock remained in the store and was offered for sale as usual in a continuous business until it was seized by the sheriff by virtue of the *fi. fa.* in favor of M. C. & J. F. Kiser & Co., issued upon the mortgage which had been given to them on the 5th of February. The exact date of this levy does not appear, but it was before the plaintiffs commenced their proceeding, which was on the 1st of March, 1890. The inference may be drawn that it was at least a week before that time, for the plaintiffs allege that the sale by the sheriff was advertised to take place on the 3d day of March. The general law (Code, §3972) requires such sales to be advertised for four weeks, but by special order they may take place, where the property is perishable or expensive to keep, after ten days advertisement. Code, §3648. The mortgage was foreclosed on February 17th. The evidence in the record indicates that the stock of goods levied upon was not more than sufficient to pay the mortgage, and there is no clear evidence that the firm, as such, owned other property. It is manifest that by reason of the dissolution of the partnership and the seizure of its effects, the firm had ceased to be traders before the plaintiffs proceeded against it. This being so, the traders' act of 1881 did not apply, and the judge had no power to grant any injunction by virtue of that act. "It is to stop the

trade of a firm of traders who owe money, if they do not pay on demand, that the act was passed; these two are no longer such traders, and were not when the bill was brought." *Scott v. Jones*, 74 Ga. 763; *Comer v. Coates*, 69 Ga. 491; *Coates v. Allen*, 71 Ga. 787; *Blanchard v. Vansyckle*, 70 Ga. 278.

2. Doubtless the judge took this same view of the subject, for he declined to appoint a receiver and grant an injunction as prayed for, but simply enjoined the debtors in general terms from selling or disposing of their property. But such an injunction could not be granted without direct aid from the act of 1881, for the reason that the plaintiffs had no lien, by judgment, mortgage or otherwise, the debts in their favor being of no higher rank than promissory notes. For this decision we refer to the cases above cited.

3. The next question is as to the special injunction granted against M. C. & J. F. Kiser. That was equally unwarranted, for if the plaintiffs were in no condition to restrain their debtors from disposing of their property, they were not in a condition to hold up any of that property in the hands of the Kisers to await the result of this suit. The deed held by the Kisers, to which the injunction relates, was not a conveyance of partnership property, but of the individual property of one of the partners, J. H. Kimbrell Sr., the object of which was to give Kiser & Co. additional security for their debt against the firm of Kimbrell & Co. Why should the Kisers be restrained from surrendering that deed, whether their debt should be paid or not, if they chose to surrender it and rely wholly on the firm property for the collection of their debt? What right would that give other creditors of the firm to complain, such other creditors having no lien either upon the property embraced in the deed or any other property?

4. In dealing with the injunction granted, we treat

as unimportant to the present status of the case the allegation of the plaintiffs that some of the debt in their favor was created by fraud, and the consequent feature of the petition looking to a rescission of the sale of goods made by them to the firm of J. H. Kimbrell Sr. & Co. on account of this fraud. We understand from the record that all these goods remaining unsold were covered by the mortgage in favor of Kiser & Co.; and as there was no injunction to restrain the sale of the goods by the sheriff, we take it that the judge thought either that there was not sufficient evidence of fraud in the purchase from the plaintiffs, or else that the particular goods, not being specified by plaintiffs in their petition, could not be identified sufficiently to warrant a separate order in respect to them. We wish to be understood as making no ruling touching this element of the petition or affecting the rights of the plaintiffs to pursue any goods which they may wish to reclaim by reason of fraud committed upon them in the purchase of the same. In order to leave this element untouched, we shall, while reversing the judgment, direct that the firm of J. H. Kimbrell Sr. & Co., and the members thereof, remain enjoined from selling or disposing of any goods purchased from the plaintiffs.

*Judgment reversed, with direction.*

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GAY v. WADLEY.

Railroads. Nonsuit. Live stock.

BLECKLEY, C. J.—The plaintiff's mare having run along the railway track ahead of the train of her own accord until, reaching a trestle or open culvert, she fell into it and was injured, and the evidence showing that the train was almost stopped to give her time to escape, and that the whistle was continuously blown to frighten her from the track, and that the disaster was caused by her own obstinacy in following the track when she might have left it, the owner of the mare had no cause of action against the owner of the railway, and the presiding judge did not err in granting a nonsuit.

November 19, 1890.

*Judgment affirmed.*



From Emanuel superior court, April term, 1890. Before Judge HINES.

ROGERS & POTTER, for plaintiff.

No appearance for defendant.

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THE WESTERN UNION TELEGRAPH COMPANY v. COOLEGE.

1. The act of November 12, 1889, as to telegraph companies, does not repeal the act of October 22, 1887, relating to the same subject-matter.
- (a) It seems that the first named act is in violation of that provision of the constitution which prohibits any act of the legislature containing more than one subject-matter.
- (b) It also seems that this act, so far as it conforms to its title, applies only to such telegraph companies as might construct their lines after its passage.
2. This not being an action for damages, but an action to recover a penalty under the statute of October 22, 1887, the condition printed on the blanks of the telegraph company, requiring all claims for damages on account of sending the dispatch to be made in writing within sixty days, does not apply.

November 10, 1890.

Telegraph companies. Constitutional and statutory law. Penalties. Damages. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

Reported in the decision.

BIGBY & BERRY, for plaintiff in error.

J. F. DANIEL, *contra*.

BLANDFORD, Justice.

The controlling question in this case is, whether the act passed by the General Assembly on the 12th of November, 1889, as to telegraph companies (Acts of 1888-9, p. 175) repeals the act passed on October 22, 1887 (Acts of 1886-7, p. 111), relating to the same subject-matter. The last named act is "An act to prescribe the duty of electric telegraph companies as to receiving and transmitting dispatches; to prescribe penalties for violations thereof, and for other purposes."

The first section of this act makes it the duty of every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, to receive, during the usual office hours, all dispatches, whether from other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith and with due diligence, under penalty of one hundred dollars, which penalty may be recovered in a justice or other court having jurisdiction thereof, by either the sender of the dispatch, or the person to whom sent or directed, whichever may first sue.

The first mentioned act (that of November 12th, 1889) is declared by its title to be "An act to encourage and authorize the construction of telegraph lines in the State of Georgia, and conferring certain privileges, powers and penalties on the owners thereof, and to provide a penalty for divulging the contents of any private message by any person connected with such telegraph company." The first section authorizes any telegraph company, chartered under the laws of this State or any other State of the United States, to construct, maintain and operate lines of electric telegraph upon, along and over the highways and public roads, and across and under any waters in this State, by the erection of posts, piers, abutments and other fixtures (except bridges) necessary to sustain the wires of its lines; but it shall not incommode the use of any highways or public roads, or endanger or intercept the navigation of any waters. The second section makes it the duty of every telegraph company to receive dispatches from and for any other telegraph company or association, and from or for any person, on payment of the usual charge for the transmission of dispatches, according to the regulations of the company, and to transmit the same faithfully and im-

partially ; and for every neglect or refusal so to do, the company shall forfeit a sum of not exceeding \$100, to be recovered in an action of tort, by the person, association or company sending or desiring to send the dispatch. The third section prohibits telegraph companies or associations from discriminating against other companies, associations or individuals sending or desiring to send a dispatch, and provides a penalty of a sum not exceeding \$100, to be recovered in an action of tort. The fourth section provides that it shall be the duty of every company or association to transmit all dispatches in the order in which they are received, under a like penalty of \$100, but making an exception in favor of proprietors or publishers of newspapers. The fifth section provides a penalty for any person connected with any telegraph company in this State to divulge the contents of any private telegram. We have thus given a summary of the act of 1889. The title of the act would seem to be to authorize and encourage the construction of telegraph lines in this State, and to confer certain privileges and powers upon such companies, and penalties upon the owners thereof, and to provide a penalty for divulging the contents of any private message by any person connected with such telegraph company. This title of the act seems to contemplate more than one subject-matter, for it looks to the encouragement and authorization of telegraph lines to be constructed in the State of Georgia, and confer privileges, powers and penalties upon the owners thereof; while, at the same time, it also provides a penalty for divulging the contents of any private message by any person connected with such telegraph company. And so it appears all through the act, after the first section thereof, that there are other matters contained therein different from that of authorizing and encouraging the construction of telegraph lines within the State. It seems to us that the matters contained in the second and third section of this act are not germane

to those contained in the first section ; and so with the other sections. So it would appear that this act is in violation of that provision of the constitution which prohibits any act of the legislature from containing more than one subject-matter. And furthermore, it appears to us that this act, so far as it conforms to the title, applies only to such telegraph companies as might construct their lines after the passage of the same. We think that the legislature did not intend to apply this act to any telegraph company which had been theretofore constructed in this State, and hence we think that the act does not operate to repeal the act of 1887 above referred to.

Again, it is insisted by counsel for the plaintiff in error that by the terms of the dispatch all claims for damages on account of sending the same should be made in writing within a certain time after the sending of the dispatch, otherwise that the company would not be liable ; and that the defendant in error in this case made no claim upon the telegraph company for damages before bringing his suit. We do not think that rule of the telegraph company applies to a case like this. This is not an action for damages, but it is an action brought to recover a penalty under a statute, and therefore we think that the condition printed on the telegraph blanks of the company requiring all claims to be made in writing within sixty days does not apply to a case such as this. We are aware that there are decisions of other courts in the United States in conflict with this opinion, but there are many, however, fully in accord with it. The case of the Western Union Telegraph Company v. Cobbs, 47 Ark., 344, 1 S. W. Rep. 558, fully sustains our position.

These are the main questions in the case ; and the judgment of the court below being in accordance with the views we have herein expressed, it is therefore

*Affirmed.*

## BONE v. THE STATE.

1. The evidence showed that this was a case of murder, and the prisoner's statement was sufficient to show it.
2. The statutory provisions for two sections of the superior court in counties which contain a city of ten thousand inhabitants, are not unconstitutional.
3. That the judge, when the prisoner and his family and counsel were passing from the court-room into an adjoining room to consult, remarked, "This is spectacular," and also said to the solicitor-general, "Small potatoes, and stringy at that," in reply to an objection by that officer to a proceeding by the prisoner's counsel, was no such ruling or intimation by the court as would be the subject-matter of review; nor can this court say whether such remarks were calculated to work the prisoner any injury.
4. It was error to admit testimony as to the contents of a note which had been lost, the witness not having shown any knowledge of the handwriting of the person alleged to have written it, either by having seen her write or having had correspondence with her, or having stated that he knew her handwriting. But this is not such an error as should work a reversal, inasmuch as without this evidence the accused would properly have been convicted, nor could the jury have rendered any other verdict than that of guilty of murder.
5. The charge of the court fairly and fully submitted to the jury all the issues involved in the case.
6. While the judge might have been content, on the subject of the prisoner's statement, to have given the jury the rule laid down by the statute, yet the instructions given upon this point did not injure the plaintiff in error, as the law in substance was given in charge.
7. Looking at the whole charge, this court is satisfied that the judge intended to instruct the jury upon the subject of justifiable homicide, self-defence under the code being the same as justifiable homicide.
8. The judge fairly left it to the jury to say whether in this case there were "other instances" than those mentioned in the code, §4330, which stood upon a like footing of reason and justice with those specifically enumerated in that section.
9. The judge properly refused to give a charge which there was no evidence to sustain.
10. When a witness has been put under the rule, and comes into the court-room while other witnesses are upon the stand and hears their testimony, it is discretionary with the court to allow him to testify. It is not erroneous to allow a witness who has been

put under the rule, but who has entered the court-room and heard the prisoner's statement, to testify in rebuttal of the same.

11. What objections were made at the trial to evidence the admission of which is complained of, must be specifically stated.

November 10, 1890.

Criminal law. Murder. Courts. Jurisdiction. Constitutional law. Statutes. Trials. Practice. Evidence. Charge of court. Witness. Before Judge RICHARD H. CLARK. Fulton superior court. March term, 1890.

On the trial of J. C. Bone, the evidence showed, among other things, as follows: On the evening of the homicide, two or three hours before it occurred, he borrowed a pistol, and said he wanted to shoot a d—d rascal, or a d—d man. On the same evening, Woodward, the deceased, went to Bone's house between seven and eight o'clock, and into the room of defendant's daughter, Jessie, where he remained until nearly ten, defendant being present when he came. Jessie came out of the room and said that some one was in there. Defendant asked who it was; and his wife replied that if he was obliged to know who it was she would tell him, and that it was Mr. Woodward. Defendant ate his supper, and said there were things going on in his house that he did not like and that he was tired of, and that he was going to kill Woodward. He picked up a chop-axe; said the room-door was fastened; went out on the back porch, and said he was going in there if he had to break the door open. He was told that he had no right to kill Woodward. He called a young woman, showed her a pistol and asked if Woodward was gone. She went in, returned and told him that he was not; and defendant went away. In a short time Woodward also left. About eleven o'clock, the defendant returned and said he had killed Woodward, that he had always said he was going to do it, and that if the witness mentioned it to any one, he would kill her the same way. He told her he had to leave

town, asked her for money, and again left the house; and she was asleep when he again returned. Before coming to see Jessie, Woodward usually wrote her a note. Other young men came to see her. The first time defendant ever objected to Woodward's coming, though he had known of it, was after certain furniture was taken away from the house. This furniture had been selected by Jessie, who instructed the seller to carry notes for it to Woodward, who she said was to pay for it. This was done, and Woodward signed the notes and made a payment, but on subsequent default the dealer sent for and obtained the furniture. When it was delivered at the house, the defendant asked who bought it; and Mrs. Bone told him she bought it. He did not know that Woodward had anything to do with it; but when it was removed, defendant became angry and objected to his being there. He made different and conflicting statements about the killing, after it occurred, to the coroner's jury and others. At first he denied knowledge of the shooting, but subsequently admitted having done it; and finally told the coroner's jury that he met Woodward and asked if that was Woodward; that Woodward replied yes; that the defendant said, "You have been coming to see my daughter, and I want you to stop"; that Woodward replied, "Why, it is none of your d—d business"; and that then defendant shot Woodward, who moved off, and defendant shot again. He further said that if Woodward had not made that remark, he did not think he would have shot him.

The prisoner's statement was, in brief, that this had been going on six or seven months; he had been trying to find out whether or not Woodward was a married man, and a few days before the killing, had learned that he was, but never saw him until that night; went home as usual, and after supper, heard somebody walking in

the house; asked who it was, and repeated the question three or four times before receiving an answer, and finally his wife told him it was Woodward; he said he was going to see Woodward, and went out and picked up a hatchet and threw it down at the gate; then went away from the house, and after asking several persons for a pistol, borrowed one; then returned, met Woodward, asked if it was he and received an affirmative answer; then said, "I want to have a little talk with you," and Woodward replied, "All right." "I says, 'Is you a married man?' He says, 'Is that any of your business?' I says, 'I learn that you are a married man; you have been coming to see Jessie, and I am going to put a stop to it'; and he said, 'I will come to see Jessie as much as I d—d please,' and he grabs me. I throws my hand back right there [indicating], and in the struggle I shot him; and after I shot him he run up the hill, and after he stopped there I went on home. That is the whole truth. I didn't borrow the pistol, gentlemen, to kill Mr. Woodward; I borrowed it to protect myself and family. . . . I was born in 1832 or 1833, I forget which. I never had any difficulty in my life; I never had any fight in my life. I have been living in Atlanta since 1853."

The grounds for new trial not fully stated in the opinion are as follows:

Counsel for the defendant, followed by him and his family, walked across the judge's platform and in the rear of his seat on their way to the prisoner's room for consultation; and as they did so, the judge remarked, "This is spectacular," upon which there was laughter in the audience. The error assigned is, that this remark was calculated to place and did place movant and his family in ridicule before the jury, and him and his counsel at a great disadvantage in securing fair and impartial consideration by the jury; and that the effect of it was to



impress the jury that the court and the audience considered the trial as a mere farce.

A policeman witness identified certain keys as found in the Bone house, and on cross-examination, testified that every one of them was so found, and that he recognized them. The solicitor-general tendered the keys in evidence, and the defendant's counsel tossed them to his associate counsel, saying, "There, Frank, take your keys from the bunch." The solicitor-general objected to this transaction; and the judge said, "Small potatoes, Mr. Hill." "And few in the hill, your Honor," replied the solicitor-general. "And stringy at that," rejoined the judge, who certifies that he meant that the transaction was too small to treat seriously as affecting the merits of the trial. The defendant assigned error because such remarks were an expression of opinion by the court upon the evidence, and were such as to humiliate counsel in the presence of the jury, to the detriment of defendant and his defence; it being his right to cross-examine the witness and to demonstrate before the jury that he was a mere machine, if such could be done.

A witness testified that he was acquainted with the handwriting of Jessie Bone, and saw a note from her that Woodward had, about certain furniture; that he never saw Jessie Bone in the act of writing, and the way by which he knew her handwriting was the frequency of the notes that were brought to his place of business, where Woodward was employed at work for him; that the notes were all signed in the same handwriting, and the note about the furniture was in the same handwriting of the others he had seen, which were a good many; but that he did not know whether she wrote the others. He was asked by the solicitor-general what, if any, threat was made in the note about the furniture. The defendant objected, because the

witness, never having seen Jessie Bone in the act of writing, knew nothing, actually, about her handwriting. The objection was overruled.

The next ground is, that the court did not fairly and fully submit, in his charge to the jury, the issues involved in the case; the jury being confined to the simple propositions that a father may kill a man to prevent adultery with his daughter, if there is a necessity for it, and is not justifiable in killing another who has committed adultery with his daughter, after the adultery has been committed. The defendant contended that he had knowledge of Woodward's previous visits, but thought they were legitimate; had just ascertained that he was a married man; went to the door to inquire if such were a fact, for the purpose of prohibiting further visits; found the door locked and went away; met him coming away from the house; asked him if he was a married man, and warned him to discontinue his visits; he refused, and after a struggle defendant shot him to prevent his further visits and his debauching his daughter.

After calling attention to the evidence, the court charged: "In contrast with that, he has given you his statement not under oath. The law gives that right to every person who is tried for a crime or misdemeanor; whether it is a felony or a misdemeanor, it confers that right upon every defendant in every case; he is allowed to give to the jury his version of it, to say to them such facts as he thinks necessary to say in his own defence; and then the law says the jury may give that statement just such force as they may see fit." Error, 1st, in speaking of the statement as being "in contrast" with the evidence; and 2d, in denominating it the prisoner's version of it.

The court charged: "All other instances, now you see, the law has defined as specifically as it can; and

having recognized, or realized rather, that there may be some cases of self-defence that have not been specifically defined by human foresight or sagacity, it adds this other section so as to cover what it might have failed to specify; and it says, all other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide. Then you are to consider the principles of self-defence which I have read to you, and also this section, and determine in your own mind if the defendant has brought himself within any of the instances as prescribed by the code, which stand upon the same footing of reason and justice as those enumerated. Now the defendant claims before you what he considers the same footing of reason and justice, that he killed Mr. Woodward—he fired the pistol shot which took his life—because of his criminal or proposed criminal connection with his daughter. That section, gentlemen of the jury, has undergone the review of our Supreme Court. The only guide I have for my judgment, and which I am to impart to you for your judgment, is the construction that tribunal has given to this section. Therefore, I charge you the expounding of this section by the supreme judicial tribunal of the State, establishing the following principles.” Error, because the jury must naturally have concluded that the judge did not himself believe that such a defence was good in law, and gave such charge only because the Supreme Court had so construed the section; and such an intimation was prejudicial to the movant, and such reference to the Supreme Court was error.

F. R. WALKER and J. A. GRAY, by brief, for plaintiff in error.

CLIFFORD ANDERSON, attorney-general, C. D. HILL, solicitor-general, and W. C. GLENN, *contra*.

BLANDFORD, Justice.

The plaintiff in error was convicted in the superior

court of Fulton county of the offence of murder, and he moved the court for a new trial upon the several grounds contained in his motion, which was refused by the court, and he excepted.

The general grounds, as to the verdict being contrary to law and the evidence and without evidence to support it, seem to us untenable. The evidence introduced by the State showed very clearly, as will appear by the record, that this was a case of murder. Even the statement of the accused himself was sufficient to show that this was a case of murder.

The first special ground in the motion for a new trial alleges that RICHARD H. CLARK, the presiding judge, had no authority to hold the superior court of Fulton county, or to try movant upon the charge preferred against him, the said RICHARD H. CLARK being judge of the Stone Mountain judicial circuit, and MARSHALL J. CLARKE, the judge of the Atlanta judicial circuit, at the same time holding and presiding over the superior court of Fulton county, then in session and engaged in the trial of civil business in the room provided by the county authorities for the superior court; and movant avers that the act of the legislature of Georgia providing for two sections of the superior court in counties wherein there is a city of ten thousand inhabitants, and incorporated in section 247(a), (b), (c), (d) and (e), of the *addenda* to the code of Georgia, and acts amendatory thereof, is unconstitutional and void. Article VI, section III, paragraph 1, of the constitution of this State, declares: "There shall be a judge of the superior courts for each judicial circuit, whose term of office shall be four years, and until his successor is qualified. He may act in other circuits when authorized by law." The eighth paragraph of the following section declares that "The superior courts shall sit in each county not less than twice in each year, at such

times as have been or may be appointed by law." The act which is called in question by the plaintiff in error is that of September 29th, 1879 (Acts of 1878-9, p. 149), as amended by the act of December 24th, 1886 (Acts of 1886, p. 34), which act is entitled "An act to declare and amend the laws of this State touching the jurisdiction and modes of procedure in the superior courts in certain cases, so far as relates to counties having therein a city of ten thousand or more inhabitants." The act of 1879, as amended by the act of 1886, makes provision that two or more judges of the superior court may preside in bank, or that said courts may be held in two or more sections at the same time by different judges, in any separate rooms in the court-house or at the county-site, as may be convenient; the second section providing for exceptions to the rulings of the judge, and writs of error to the Supreme Court. The original act provides that "all business, and all causes pending or which may be brought in said courts, other than indictments for felonies, which latter are to be tried in the said superior courts in manner and form as heretofore practiced," shall be embraced within its provisions. This section was amended by the act of 1886 so as to embrace "all business and all causes, whether civil or criminal, pending or which may be brought in said courts." We do not think that the act of 1879, as amended by the act of 1886, is in any manner in conflict with the constitution of this State; and therefore the plaintiff in error can take nothing by this ground of his exception. The constitution requires *at least* two sittings of the superior court in each county, but does not prohibit more sittings to be held, nor does it prohibit two or more sections of the superior court presided over by different judges sitting at the same time, where the interest of the public requires the same to be done, so that justice shall not be denied to any one.

Nor is it unconstitutional because it provides for this scheme only for counties containing large cities, the legislature having power to classify in general terms.

The error assigned in the second ground of the motion is as to the conduct of the presiding judge, who, when the prisoner and his family and his counsel were passing from the court-room into an adjoining room to consult, remarked, "This is spectacular." We do not think this was any ruling or such intimation by the court as would make it a subject-matter of review by this court; and we cannot say whether it was calculated to work the plaintiff in error any injury or not. The third ground of exception complains of certain remarks made by the court to the solicitor-general, as follows: "By the court, 'Small potatoes, Mr. Hill.' By Mr. Hill, 'And few in the hill, your Honor.' By the court, 'And stringy at that.'" We do not clearly understand the meaning of these remarks by the court and the solicitor-general, but this assignment of error is subject to what we have already said as to the second ground.

The fourth ground complains that the court committed error in admitting in evidence, over the objection of defendant's counsel, the contents of a certain note which it was claimed was written by Jessie Bone, the daughter of the accused, to the deceased, Woodward. We think the court ought not to have admitted the contents of this note in evidence, the note having been lost and the witness not having shown any knowledge of her handwriting, either by having seen her write or having had correspondence with her, or having stated that he knew her handwriting. A witness may testify to handwriting if he knows the same, and it matters not how that knowledge may be acquired; but it is very clear to our minds that he should have that knowledge before he can testify as to the contents of a

writing which is lost. While we think this was error, we do not think it was such an error as should work a reversal of this case, inasmuch as we are satisfied that without this evidence the accused would properly have been convicted; and, indeed, we cannot see how the jury could have rendered any other verdict. Were this a close case upon the facts, however, we might be inclined to reverse the judgment, and doubtless would. The case of *Smith v. The State*, 77 Ga. 705, does not apply to the facts of this case. In that case the witness did identify the letter by a certain blot thereon, which he noticed when he carried the letter to defendant.

The fifth assignment of error complains that the court did not fairly and fully submit all the issues in the case to the jury. We think, upon reading the charge of the judge who tried the case, that he fairly and fully submitted to the jury all the issues involved in the same.

The sixth assignment of error complains of the instructions which the court gave to the jury as to the prisoner's statement. We think the court might have been content on this subject to have given to the jury the rule laid down by the law; that is, that the prisoner has a right to make a statement, and the jury may give to that statement such force as they may think proper, and may believe the same in preference to the sworn testimony in the case, if they think it be true; but we do not think that the instructions of the court to the jury upon this point injured the plaintiff in error in any way whatever, as he gave in substance the law in charge.

The seventh ground complains that the court erred in charging the jury as follows: "The defendant maintains before you that the homicide was committed in self-defence." The error complained of is, that the blending together of the terms "self-defence and justi-

fiable homicide" was unnecessary and illegal. In looking at the whole of the charge we are satisfied that the court intended to instruct the jury upon the subject of justifiable homicide, self-defence under our code being the same as justifiable homicide.

The eighth ground of the motion complains that the trial judge erred in charging the jury as to the meaning of "all other instances," which occurs in that section of the code defining justifiable homicide. We do not think that the criticism upon the charge of the court as implied in this ground of error is well-sustained by the record. We are of the opinion that the court very fairly left it to the jury to say whether in this case there were "other instances" than those mentioned in the code, which stood upon a like footing of reason and justice with those specifically enumerated in that section of the code cited by the court, which should be deemed justifiable homicide. We think the court gave a very fair exposition of this section of the penal code.

The ninth assignment of error is the refusal of the court to give the following in charge to the jury, as was requested in writing by defendant's counsel: "If the deceased had been in the habit of visiting the daughter of the defendant at the defendant's house and there having criminal intercourse with her, and the fact of such criminal intercourse having come to the father, and he killed the deceased for the purpose of preventing further criminal intercourse with his daughter, and such killing was then and there necessary to prevent the deceased from having further criminal intercourse with the defendant's daughter, then it would be for you to say whether this would be one of those instances enumerated in sections 4331, 4332 and 4333 of the code of Georgia; and if you find such to be the case, then you would be authorized to find the killing to be a justifiable homicide, and the defendant not guilty." We



think the court did right in refusing to give this request in charge to the jury, there being no evidence to authorize the same, the evidence being that the accused knew on the night of the homicide that the deceased had visited his daughter, threatened to kill him, went off some distance to procure a pistol, and when the deceased had left his house and had proceeded some distance therefrom, he was shot down by the accused, and from the wounds died. There was not a particle of evidence to show that he killed the deceased to prevent him from having further illicit intercourse with his daughter; so we think the court did right to refuse this instruction.

The tenth ground of the motion complains that the court erred in refusing to give in charge to the jury a request made by the defendant in writing, which is almost identical with the one above quoted. What we have said as to the last ground of error assigned, applies equally to this.

The eleventh ground complains that the court erred in refusing to give the following written request by defendant: "The daughter, so long as she is a minor and resides under her father's roof, is subject to his control. It is his right, within the bounds of reason, to say who shall or who shall not visit and associate with her there. If a person has been visiting even with her father's knowledge and without his objection, and the father afterwards ascertained that the purposes of such visits were for the commission of adultery or fornication, or fornication and adultery, he has the right to demand that such visits cease, and to use just such force as is necessary to prevent their repetition. The penal code enumerates certain instances of justifiable homicide, and then in another section sets forth the general provisions, 'all other instances which stand upon the same footing of reason and justice as those enumerated shall

be justifiable homicide.' One of the principles of reason and justice on which a homicide can be justified is this: that such homicide was committed as a defence against a serious injury, or to stay its progress. A father has the right—yea, it is his duty—to protect and defend his daughter against the seducer or the fornicator. So long as the daughter is a minor and resides under her father's roof, it is her duty to conform to any reasonable and just regulations he may lay down for guiding her conduct or choosing her associates, and it would be the duty of all other persons to acquiesce in the father's authority or directions, so far as known, in respect thereto; and if any man should violate this principle for the purpose of seduction or fornication, the father would have a right immediately and swiftly to resort to force for his own and her protection, and to use just so much force as is necessary, and to make such defence complete and effective, even to slay the aggressor if such killing should be actually necessary for such purpose." We think what we have already said as to other objections will equally apply to this exception.

The twelfth ground of the motion for a new trial complains that the witness J. M. Wright, over defendant's objection, was permitted to testify in rebuttal to the defendant's statement. The witnesses were separated under the statute, but about the time defendant went upon the stand, witness Wright entered the court room and took his seat beside the solicitor-general, remaining there all the while defendant was making his statement; and counsel for the accused contend that the said Wright was rendered incompetent as a witness, especially as in rebuttal to the prisoner's statement. When witnesses are "put under the rule," as it is called (that is, when they are separated), and one or more of them should come into the court-room, even

while other witnesses are upon the stand, and hear what was testified to by them, this court has held that it is discretionary with the court below to allow such witnesses to testify or not. But in this case, where the prisoner came forward and took the stand to make a statement, there was clearly no error to allow a witness who had been put under the rule, but who had entered the court-room and heard this statement, to testify in rebuttal of the same.

The thirteenth ground complains that the court erred in permitting the solicitor-general to propound to witness J. M. Wright, over defendant's objection, the following question: "What did he say, if anything, about any struggle, in that statement before the coroner's jury?" to which the witness responded: "He did not say they had any struggle; said didn't have." The precise objection to this testimony is not stated, and we do not see very readily why the same was error. But we have frequently ruled that objections of this sort to the evidence must state the ground of objection which was urged at the time of its introduction.

The fourteenth ground of the motion for a new trial is subject to the same objection. It complains of the introduction of certain evidence by the witnesses Wright, Gunn, Bedford, Simpson and others, without stating upon what ground the evidence was objected to.

The fifteenth ground we do not consider, for the reason that the objection to the evidence is not stated; nor, so far as the record discloses, was it stated to the court below.

The sixteenth ground complains that the court erred in refusing to rule out, upon defendant's motion, the answer of the witness Hall as to the contents of the note said to have been written by Jessie Bone to the deceased. We have already disposed of this ground of the motion.

The seventeenth ground of the motion complains that the court erred in permitting a certain witness, over defendant's objection, to testify as to certain matters, it not appearing, however, that the grounds of this objection were stated or urged before the court at the time the testimony was admitted.

These embrace all the grounds in the motion for a new trial; and upon considering the whole case, we think there was no error on the part of the court below in refusing to grant a new trial. *Judgment affirmed.*

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FRANCIS v. THE STATE.

~~There being evidence from which the jury could reasonably infer the~~  
guilt of the accused of stabbing, and the trial judge being satisfied with the verdict, this court does not feel authorized to interfere.

November 10, 1890.

Criminal law. Stabbing. Verdict. Before Judge VAN EPPS. City court of Atlanta. March term, 1890.

Upon the trial of Francis, Hayes testified, in brief: About ten or eleven o'clock at night, at a party, he and defendant got into a dispute about a place in a dance, and when the dance was over, Hayes asked Francis out to settle it, and they went out about 150 yards, stopped and began to talk over the matter, when England came running down there and shoved Francis against Hayes. Hayes felt his clothes pull, and after he was arrested by the police, found that he had been cut where he felt his clothes pull, and knew by that that Francis was the man who cut him. He did not see Francis or any one cut at him, nor did he see any knife in Francis' hand. He did not slap Francis that night when England ran up. England shoved Francis against him and shoved him back all at once. Hayes was large and stout, and Francis was a very small man. Hayes was cut through the clothing and into his body

86	132
106	730

on the right side. There was only one other witness for the State, and he testified that England ran up and shoved Hayes and Francis apart, and said, "Damn it, get out of the way and let him fight a man of his size," and caught hold of Hayes and cursed him and shoved him back. Witness saw Francis strike at Hayes, but does not know whether he hit him or not; did not see Francis with a knife. About the time England began to curse and shove Hayes back, the police arrived and arrested them. Hayes did not know he was cut until he was arrested, and then accused Francis of it; and witness did not know the cutting was done until after they were arrested. Witness went down as Hayes' friend. It was pretty dark when the difficulty occurred. When they had turned one of Francis' pockets wrong side out, witness' brother started to search the other pocket, "and Francis said no damn man should search him, putting out his hand in front of him."

The testimony for the defendant tended to show: Each of the parties went to the place where the fight occurred, accompanied by friends. Hayes called Francis very opprobrious names, and Francis replied similarly, and then Hayes slapped Francis and stepped back, leaving four or five feet between them, and then England ran in between them and shoved Francis back to his left and Hayes to his right. Francis did not strike at Hayes at all, and England did not shove Francis against Hayes, but shoved them six or seven feet apart and in opposite directions, and then a witness took hold of Francis and carried him still further off. It was pretty dark at the place. Hayes told a witness, two or three days before the trial, that he did not know who cut him. Francis had no knife when witness took hold of him. Witness did not see him cut Hayes; if he had done so, witness would have seen him. Each man's friend searched him, and Hayes' friend either

put something in his pocket or took it out; and one of Hayes' friends started up to Francis as if he were going to search him, and Francis told him not to touch him. This search took place before they began cursing each other

ARNOLD & ARNOLD, for plaintiff in error.

F. M. O'BRYAN, solicitor, *contra*.

BLANDFORD, Justice.

Francis was tried and found guilty of stabbing. He moved the court for a new trial, which the court refused, and he excepted. The exceptions in this case are, that the verdict is contrary to law, contrary to the evidence, and contrary to equity and justice.

We have examined the evidence in this record closely, and while there is some doubt upon our minds whether the accused should have been convicted, yet we think there was evidence from which the jury could very reasonably have inferred his guilt. This being so, and the court below being satisfied with the verdict of the jury, we therefore do not feel authorized to interfere therewith, and the judgment of the court below is

*Affirmed.*

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CLARKE v. DOUGLASS, executor.

To make the transfer of an execution issued by a county against a defaulting tax-collector and his sureties available against third persons, the terms of the code, §891(a), must be strictly complied with; the execution must not only have been transferred by the proper person, but must also have been properly recorded.

November 10, 1890.

Money rule. Tax executions. Transfers. Record. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term, 1890.

Reported in the decision.

JOHN C. REED, for plaintiff in error.

ARNOLD & ARNOLD, *contra*.

86	125
86	778
86	125
1110	768

BLANDFORD, Justice.

The county of Fulton issued a writ of execution against Samuel R. Hoyle, as principal, and W. H. Clarke and others, securities. Mrs. Clarke, the plaintiff in error, bought this execution, which was issued for county taxes, and caused the same to be transferred to her by the county attorney, at the instance of the commissioners of the county of Fulton, so far as the same was against her husband, W. H. Clarke. This execution and transfer were not recorded, but Mrs. Clarke caused the same to be levied upon certain property of W. H. Clarke, one of the defendants in said execution; the property was sold, and the money arising from the sale went into the hands of the sheriff. Mrs. Douglass also had an execution against W. H. Clarke, and she notified the sheriff to hold up said money, and a rule was brought to distribute the same. The court awarded the money in the sheriff's hands, or a part thereof, to Mrs. Douglass upon her execution against W. H. Clarke, decreeing that so much of the fund in the sheriff's hands as might be necessary should be applied in satisfaction of the Douglass *fi. fa.*, and the remainder on the other *fi. fa.*; to which judgment Mrs. Clarke excepted.

The execution transferred to Mrs. Clarke was not issued upon any judgment of the court. Section 891(a) of our code declares that "Whenever any person, other than the person against whom the same has issued, shall pay any execution issued for State, county or municipal taxes, or any other execution issued without the judgment of a court, under any law, the officer whose duty it is to enforce said execution shall, upon the request of the party paying the same, transfer said execution to said party; and said transferee shall have the same rights as to enforcing said execution and priority of payment as might have been exercised or claimed before said

transfer : Provided, said transferee shall have said execution entered upon the execution docket of the superior court of the county in which the same was issued, and if the person against whom the same was issued resides in a different county, then also in the county of such person's residence within thirty days from said transfer.

. . . . And in default thereof, such executions shall lose their lien upon any property which has been transferred *bona fide*, and for a valuable consideration, before the record and without notice of the existence of such execution or executions." We think, under this section of the code, to make the transfer of such an execution available against third persons, that the same should have been recorded as required by law. No execution such as this, which is embraced in this section of the code, can be transferred except under and by virtue of this act, and therefore the terms of the act must be strictly complied with. The execution must not only have been transferred by the proper person, but must also have been properly recorded, in order to bind a third party, as required by law. We think, therefore, that the execution in favor of Mrs. Douglass took precedence over the execution held under this transfer to Mrs. Clarke, and that the court was right in directing the execution of Mrs. Douglass to be first paid out of the fund in the hands of the sheriff. *National Bank of Athens v. Danforth*, 80 Ga. 56; *Murray v. Bridges*, 69 Ga. 644; *Hoyt v. Byron*, 66 Ga. 351.

*Judgment affirmed.*

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VINING v. THE OFFICERS OF COURT.

86	127
116	804

1. It was not error to refuse to dismiss the levy of an execution for costs, upon the ground that the sheriff, who was the levying officer, being interested as a plaintiff, was incompetent to make it; nor upon the ground that the execution did not follow the judgment, in that the judgment was in favor of the officers of court and the



execution was in favor of such officers and of others who claimed witness fees. It was competent for the clerk to tax the costs in a case which had been pending in court, whether those costs consisted of witness fees, fees due the clerk, sheriff, jurors, or others.

2. Only the aliquot part of the plaintiff in error, unaffected by the homestead, in the property levied on, was subject to the execution not the whole property, as was decided in this case in 82 Ga. 222. The verdict of the jury and rulings of the court below were in accordance with this decision.

November 10, 1890.

Claim. Levy. Sheriff. Cost execution. Before Judge RICHARD H. CLARK. Clayton superior court. September term, 1889.

An execution in favor of the officers of court of Clayton county was levied on six bushels of corn and a half-interest in 100 acres of land and in a mill and fixtures thereon, as the property of the defendant in the execution, who thereupon, as the head of a family, interposed a claim to the property as a homestead exemption. Under the evidence and the judge's charge, the jury found subject the interest of the defendant in execution as shown by the evidence; and he took exceptions, the grounds of which appear in the opinion.

JOHN B. HUTCHESON, for plaintiff in error.

J. T. SPENCE and W. L. WATTERSON, *contra*.

BLANDFORD, Justice.

This was an execution issued by the clerk of the superior court in favor of the officers of court against the plaintiff in error, which was levied upon certain of his property. The defendant in the court below moved to dismiss the levy, upon the ground that the levying officer, being interested as a plaintiff, was incompetent to make it. The court overruled this motion, and his ruling is excepted to. We think the court did right. It has been the invariable rule for the sheriff, or other levying officer, to levy any execution for costs, whether he be interested in the costs or not. We know of no

instance to the contrary. Indeed, the very levy of any execution, although not in favor of the levying officer, would give such officer a right to costs. Claimant also moved to rule out the execution upon the ground that it was levied by Archer, the sheriff, which motion was also denied. He further moved to dismiss the levy upon the ground that the execution did not follow the judgment in this: the judgment was in favor of the officers of court, and the *fi. fa.* was in favor of the officers of court and one Yancy and others, who claimed witness fees. This motion was also overruled, and movant excepted. We think the levy was properly made by Archer, the sheriff; and that it was perfectly competent for the clerk to tax costs in a case which had been pending in court, whether those costs consisted of witness fees, fees due the clerk, sheriff, jurors or others. All were properly the costs in that case. Such has been the established rule from time immemorial in this State.

Claimant then moved to dismiss the levy upon the following grounds: (1) It having appeared from the evidence that the property levied upon was homestead property, the same could not be levied upon without an affidavit having been filed by plaintiff, stating that the debt upon which the execution was founded was one from which the homestead was not exempt; it being admitted that no such affidavit had been filed. (2) The evidence showed that the property levied on was homestead property, and therefore a trust estate; and it could not be levied on and sold under the *fi. fa.*, but plaintiff should commence equitable proceedings in order to condemn the trust estate. The court overruled this motion, and claimant excepted. We think this ruling of the court is in accord with the decision in this same case, which will be found in 82 *Ga.* 222. Only the plaintiff's aliquot part, unaffected by the homestead, in the property levied on, was subject to the execution,

not the whole property; and such was the verdict of the jury. In our opinion the verdict of the jury was right; and the judgment of the court below is

*Affirmed.*

86	130
87	226
88	130
101	665

86	130
127	609

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VEAL v. THE KEELY COMPANY.

A firm may execute a mortgage upon its stock of goods or other assets to secure the payment of an individual debt of one of its members. More especially would this be so when such debt has been made, by agreement between the members of the firm, a partnership debt.

November 10, 1890.

Money rule. Mortgages. Partnership. Before Judge RICHARD H. CLARK. DeKalb superior court. February term, 1890.

Reported in the decision.

SIMMONS & CORRIGAN, for plaintiff in error.

COX & REED, W. M. RAGSDALE and J. B. STEWARD,  
*contra.*

BLANDFORD, Justice.

This was a contest for money in the hands of the sheriff. W. J. Veal claimed the money under the foreclosure of a mortgage against Veal & McClelland, dated January 6th, 1890, and duly recorded. The Keely Company claimed the money upon the foreclosure of a mortgage against Veal & McClelland, dated January 7th, 1890, and duly recorded. The court awarded the money to the Keely Company, and W. J. Veal excepted to this ruling of the court.

It appears from the record in this case that L. O. Veal, of the firm of Veal & McClelland, borrowed certain money from W. J. Veal, the plaintiff in error, which he put in as a part of his share of the capital stock of the firm of Veal & McClelland; that McClelland, his partner,

having drawn from the assets of the firm an amount greatly in excess of his share, L. O. Veal proposed to draw out enough from the funds of the firm to pay the money he owed W. J. Veal, his father; thereupon it was agreed between L. O. Veal and McClelland, composing the firm of Veal & McClelland, to allow the money to remain in the business of the firm upon the condition that Veal & McClelland would make and execute their mortgage to W. J. Veal to secure the payment of the money which his son, L. O. Veal, had borrowed; notes for the amount were executed by the firm of Veal & McClelland, and a mortgage to certain of the stock of goods of Veal & McClelland was given to W. J. Veal to secure the payment of the same.

We think it beyond question that a firm may execute a mortgage upon the firm's stock of goods, or other assets, if they think proper to do so, to secure the payment of an individual debt of one of the members of the firm. More especially would this be so when it appears that such debt has been made, by agreement between the members of the firm, a partnership debt. It is laid down by Jones on Chattel Mortgages, section 44, that: "A mortgage by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. The giving of such a mortgage is itself a waiver. The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts. The mere preference of individual debts by mortgage to secure them over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside. The partnership creditors have no lien on the property of the partnership, if the partners themselves have none." The rule laid down in this section is sus-

tained by the authorities cited, and we think this principle applies to the present case. And therefore, as it appears that the mortgage of W. J. Veal was the oldest liened upon the property sold, which brought the money into court, we think that the money in the hands of the sheriff should have been first applied to this mortgage.

*Judgment reversed.*

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GAVIN v. THE CITY OF ATLANTA.

Whenever the legislature has provided for a registration of voters in a municipality, the number of voters registered thereunder is the true test for ascertaining whether the requisite two thirds majority of the qualified voters of such municipality has been obtained at an election for which such registration was provided, and in which the assent of such a majority was requisite to empower the municipality to incur an indebtedness under the constitution of 1877. Where the legislature has prescribed how a majority or two thirds of the qualified voters of a municipality shall be ascertained, the method prescribed by it prevails, and not the common law rule; but the rule prescribed by the legislature of this State for general use in such cases does not apply in cases where the legislature has provided for registration, but applies only where there has been no other or better means provided for ascertaining who the qualified voters are.

November 10, 1890.

Constitutional law. Elections. Registration. Municipal corporations. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term, 1890.

Reported in the decision.

ELLIS & GRAY, for plaintiff.

J. B. GOODWIN and J. A. ANDERSON, for defendant.

SIMMONS, Justice.

Mrs. Gavin filed her petition for injunction and relief against the city of Atlanta, and alleged, in substance, that she was a tax-payer of the city; that the city was about to issue and sell bonds to the amount of \$250,000 for the purpose of building a new system of water-

86 132  
86 607

86 132  
96 253

86 132  
99 11

86 132  
102 58

86 132  
1112 796

1112 799  
112 800

1112 801

86 132  
115 916

86 132  
118 888

86 132  
122 403

works, and had negotiated the bonds for an agreed price and was about to deliver them; and that these bonds were illegal for the following reasons: They were voted upon at an election held on April 23, 1890, specially ordered for that purpose, and less than two thirds of the number of those who had registered for the election voted in favor of issuing the bonds, 1,608 votes being cast, out of which number 1,259 were for bonds. At the last general election in the city only 1,633 votes were cast, which were less than two thirds of the votes registered for that election; so that the votes cast at the special election were less than two thirds of the voters who had registered for either the special or the general election. The constitution requires the assent of two thirds of the qualified voters of the city to authorize an issue of such bonds, and the petitioner contended that this means two thirds of those entitled to vote. It was contended that under the charter of the city, the laws of Georgia and the constitution of the State, those persons who registered were not only qualified voters, but expressed by the act of registration a desire to participate in the issue raised by this special election, and they could as well act against the bonds by non-participation as by active protest at the ballot-box; that registration was a test of the qualification, and the qualified voters of the city were those who enrolled themselves under the law; and that two thirds of the voters at either the general or special election having failed or refused to vote for the bonds, they were illegal and ought to be enjoined.

The defendant by its answer practically admitted all the allegations in the petition. It admitted that the number of persons registered for the last general city election preceding the special election in question, were 2,755, and the number of votes cast in the general election were 1,633. The number of persons registered

for the water-bonds election of April 29th, 1890, were 2,583; and the number of votes cast at that election were 1,608; 1,259 being for issue of bonds and 349 against. The defendant contended that the bonds, having received two thirds of the votes actually cast in the special election and also two thirds of the votes actually cast in the general election, although not two thirds of the registered voters at either election, were valid. The injunction prayed for was refused, and the petitioner excepted.

As we have seen, the plaintiff contended that the bonds had not received the constitutional majority because they had not received the assent of two thirds of the qualified voters of the city, the qualified voters being those who had registered for that special election. The defendant admitted that two thirds of the voters who had registered did not vote in favor of the issuance of bonds, but contended that under the code, §508(1), two thirds of the number of those who had voted at the last general election had assented to the issuance of the bonds, and they were therefore legal.

The constitution of 1877, art. 7, sec. 7 (Code, §5191), prescribes that no debt exceeding one fifth of one per centum of the assessed value of taxable property therein, shall be incurred by any county, municipality or political division of the State, "without the assent of two thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law." The act of 1879, code, §508(1), declares that "In determining the question whether or not two thirds of the qualified voters in said county, municipality or division voted in favor of the issuance of said bonds, the tally-sheets of the last general election held in said county, municipality or division shall be taken as a correct enumeration of the qualified voters thereof." The legislature, in granting the present charter of the

city of Atlanta, provided that "the mayor and general council of said city shall have power and authority to provide for the registration of voters prior to any municipal election in said city; to make all needful rules and regulations for the same, and require that no person be permitted to vote unless registered as aforesaid." Code of Atlanta, 1886, §102. In accordance with this provision of its charter, the mayor and general council of Atlanta passed the necessary ordinances providing for the registration in all municipal elections, and according to the bill and answer in this case, required a special registration for this special election, with the result stated. The question for us to decide is whether the mayor and council, in determining whether or not two thirds of the qualified voters voted in favor of the issuance of bonds, should be guided by the general act of 1879, code, §508(1), by the common law rule, or by the registration list which they had required taken for that special election. We admit the common law rule to be that where an election is held and a majority or two thirds vote is necessary, the majority or two thirds of those voting at the election would be sufficient. But the authorities generally concur that where the law prescribes how the majority or two thirds shall be ascertained, that method prevails, and not the common law rule. We are very clear that the common law rule does not prevail in this State, for the legislature has prescribed a different rule in all cases where it has not enacted other means to ascertain whether the necessary two thirds majority has been given in a particular election. It is not disputed that the legislature has the authority to prescribe the test for ascertaining the necessary majority. *Caruthers, J.*, in the case of the *Louisville, etc. R. R. v. County Court*, 1 Sneed (Tenn.), 637, 62 Am. Dec. 424, holds that the legislature has such power. It is a rule of evidence in such cases to



ascertain the number of qualified voters which the legislature has power to prescribe. We think that section 508(1) of the code, *supra*, applies only where there has been no other or better means of ascertaining who the qualified voters are, but that it does not apply in any case where the legislature has provided for registration in a particular county or municipality. Whenever it has provided for a registration, as in the case under consideration, that is the true and legal test for ascertaining whether the requisite two thirds majority has been received or not. The constitutional provision which requires the assent of two thirds of the qualified voters is mandatory. It would be absurd, under this provision, to hold that the qualified voters of a municipality should register in order that it might be ascertained who are qualified to vote, and then hold that this registration has no effect in determining the number of qualified voters in the municipality, but that the test should be the number of voters at an election some twelve months prior to that time. Suppose in this case that four thousand two hundred and fifty-nine persons had registered, and three thousand of them had voted against the issuance of these bonds, would it be said that because 1,259, two thirds of those who voted at the last general election, had voted in favor of bonds, that was two thirds of the qualified voters of the city, when the registration, the test prescribed for this city, showed that 1,259 was not a third of the qualified voters, much less two thirds? In this special election the number of persons registered were 2,583; these were all *prima facie* qualified voters. These were the persons whom the law said were the only qualified voters in the city of Atlanta. No other person in the city than those registered could have voted at that election. The qualified voters, therefore, having been ascertained under the law, the constitution is mandatory

that two thirds of them shall assent before bonds shall be issued. The legislature has no power to prescribe a less number when that number is legally ascertained; and therefore section 508(1) cannot apply, the true number being ascertained by means of another method adopted by the legislature, and adopted for the express purpose of ascertaining who are the qualified voters in the particular case. Of course if the legislature does not adopt a different method than that prescribed in section 508(1), that is to be the test; but when it prescribes a particular method of ascertaining the qualified voters in a particular county or municipality, we hold that this must be the test. If the legislature should not prescribe any means of ascertaining the number of qualified voters, the common law rule would prevail, and the test would be two thirds of those voting at that election; but as we have said before, we think the legislature has prescribed a different rule in this State, (1) by passing a general law applicable to all counties and municipalities for which no other rule has been enacted, and (2) in providing for registration in certain counties and municipalities. And we are strengthened in this view by the fact that in the constitution of 1868 the rule laid down was the common law rule, the language of that constitution being "a majority of the qualified voters of such town or city voting at an election held for the purpose" (art. 3, sec. 6, par. 4); while in the present constitution the words "voting at an election" are left out, which seems to us to indicate that the convention desired to abolish the former rule, and to prescribe that the number required should be two thirds of all the qualified voters of the county or municipality, and not merely two thirds of those voting at the election.

We are aware that the Supreme Court of the United States, in *Carroll County v. Smith*, 111 U. S. 556, has

put a different interpretation upon the words of the constitution of Mississippi, which are similar to the words of our own constitution; but, as appears from the report of that case, while there was a registration law in the State of Mississippi, it was for general elections, and did not require special registration for special bond elections as the law governing the city of Atlanta does. And the court in that case say, quoting from the opinion of Chief Justice Waite in *County of Cass v. Johnson*, 95 U. S. 369, that the rule laid down would be different if the legislative will to that effect is clearly expressed.

We think we have shown that both the convention which adopted the constitution, and the legislature, have clearly expressed the intention that the common law rule on the subject shall not prevail in this State, (1) by omitting it from the constitution, (2) by passing a general act prescribing a different test, and (3) by authorizing special registration in the city of Atlanta.

The reasons for the change of the rule and the benefit accruing therefrom to counties and municipalities are so obvious, under the peculiar condition of affairs in this State, that we deem it unnecessary to state them.

*Judgment reversed.*

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DAVIS *et al.* v. JACKSON & KING.

1. The verdict is sustained by evidence and law.
2. Grounds for new trial not insisted upon either in the argument before this court or in the brief of counsel, will not be considered.
3. There was no error in refusing to grant a nonsuit.
4. If attorneys were employed, at an agreed fee, to recover land for their client from another, and obtained a decree compelling such other to reconvey the land to the client upon the payment by him of a certain sum, and if it were not their duty, according to the terms of the contract made, to furnish the money which, under the decree, was to be tendered, but the duty of the client, and the client neglected to raise the money within a reasonable time, though

86	138
108	389
105	596
86	138
110	590
86	138
113	609

duly notified of his duty and requested to raise it by the attorneys, they would not be deprived of their lien; it would attach to the land as against the client, and he could not divest it by declining or refusing to raise the money, or by delaying to do so for several months and then paying it and procuring the deed to be made to his wife and son instead of himself.

5. An attorney is not deprived of the lien given him by the code, by taking the note of his client for his fee.

November 10, 1890.

Attorney and client. Liens. Practice. Nonsuit. Verdict. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Jackson & King by their petition alleged that about May 27, 1882, they were employed as attorneys at law for Henry Davis, to sue for and recover in his behalf from one Morris a certain described tract of land, and to have cancelled and delivered up by Morris a deed which he held to the land, executed by Davis and his wife, or to have Morris forced to redeed the land to Davis; that Davis and his wife had deeded the land to Morris to save him harmless against any liability assumed by him in having gone upon the bond of Davis, and also to secure Morris in the payment of \$50 and interest, which Davis had agreed to pay him; that Davis was ready and willing to pay Morris the \$50 and interest, and offered to do so after all liability on the part of Morris on the bond had ceased, but Morris refused to redeed the property as he had agreed; that for the services of plaintiffs Davis agreed to pay them \$100, which is a reasonable fee for the services which they rendered him; that in pursuance of their agreement, about June 3, 1882, they filed a bill in equity in behalf of Davis against Morris, containing all of the proper allegations and prayers; that the suit came on for final adjudication at the fall term, 1883, of Fulton superior court, and resulted in a decree in favor of Davis, whereby it was decreed that Morris deliver up and can-

cel the deed made to him by Davis and his wife, and that Davis recover the real estate upon paying or causing to be paid to Morris the sum with interest for which it had been deeded to Morris as security; that no part of the \$100 fee had been paid petitioners; that the case in which they were employed had terminated, and their services were then fully and completely rendered; that within thirty days after the rendering of the decree, they filed and had recorded in the clerk's office of Fulton superior court, their proper claim of lien against the realty for the sum of \$100; that subsequent to the rendition of the decree and after the filing of their claim of lien, Davis paid Morris the money which by the decree he was required to pay in order to obtain a reconveyance, and Morris in attempted compliance with the decree, but through mistake or in wilful disregard thereof, made his quit-claim deed to the property to Davis' wife and son; that the effect of the decree and the payment of the money was to (and it did, at least so far as petitioners are concerned) revert in Davis and reconvey to him the title to the realty; yet Davis refuses to pay them the money which he owes them for fees as above stated.

The evidence in behalf of the plaintiffs showed that Davis engaged them as attorneys at law to represent him in getting back the land; that they filed the bill for him, prosecuted it and obtained the decree of October 6, 1883, ordering Morris to reconvey to Davis upon payment of a certain sum; that the fee of \$100 was reasonable and had never been paid; that Jackson had an agreement with Davis for Davis to haul sand to Jackson's building, and he was given a ticket for each load of sand hauled, and the custom was to pay such tickets weekly, but Jackson did not know how much Davis hauled, nor what was done with the tickets given him; that Davis hauled no sand after

September 22, 1882; and that Jackson did not agree to advance any money for Davis to pay Morris, but plaintiffs were simply to represent Davis as attorneys in the case. The record of the suit filed by the plaintiffs for Davis against Morris, with the decree therein, the claim of lien, and the deed from Morris to Davis' wife and son, were in evidence. The plaintiffs having closed, the defendants moved for a nonsuit, and the motion was overruled.

The testimony introduced by the defendants tended to show the following: The agreement between Davis and plaintiffs was, that plaintiffs were to tender to Morris the money which Davis owed him, and in case Morris accepted, to pay him the money and take from him a deed of reconveyance to Davis; if he refused, they were to institute a suit to compel him to accept the money and make Davis a deed; in the event of their securing a favorable decree, they were to pay Morris the amount due and get a deed from him to Davis; for all this Davis was to pay \$100 in sand hauled to Jackson's building. The plaintiffs obtained a decree in Davis' favor, but took no further steps; Davis waited several months and often urged them to carry out their contract, but they always put him off; finally he decided not to wait on them longer, sold a mule and with the money thus obtained paid Morris and got the deed; he had to sell the mule at a sacrifice, and had to employ another lawyer to obtain the deed, to whom he paid \$20. Previously, according to his agreement, he had \$100 worth of sand hauled to Jackson's building; could not read or write and kept no account, and did not make any effort to see if the sand was credited on the fee, but supposed Jackson would keep that straight; never received any money for the sand hauled, but turned over the sand tickets to King, and supposed they would be credited on the fee; never

did agree to pay the whole amount demanded of him by plaintiffs, but did offer to give King some coal in settlement of the claim.

In rebuttal, the plaintiffs introduced evidence tending to show that Davis was given a ticket for every load of sand he hauled to Jackson's building; that after the plaintiffs entered on the case, they had Davis to sign a note to them for \$100, which, when paid and not before, was to be in full of all their services, past services and those still to be rendered, in the Morris case; that the note was not paid, and that the reason they took it was that Davis had applied for a homestead, and before it was granted they wanted a showing for fee with homestead waived; that they represented Davis in several other matters at that time, and he never paid them any money except about \$35 which came from the sand tickets, and this was allowed as a credit on his account with them for services, and was taken into account in the settlement made between them and him when the note for \$100 was given; that after obtaining the decree, King told Davis how much he was to pay Morris and about getting the deed as decreed, and also told Davis to get up the money and he (King) would attend to it, but Davis never got the money and never said anything more to King about it until after King found out that he had paid the money and got the deed; that several times since the giving of the note and before and after this suit was brought, Davis promised to pay King; and that the plaintiffs have also brought suit on the note.

The jury found for the plaintiffs. The grounds of demurrer and of the motions for nonsuit and new trial, are stated in the opinion and need not be repeated here.

BLALOCK & BIRNEY, for plaintiffs in error.

JACKSON & JACKSON and KING & ANDERSON, *contra*.

SIMMONS, Justice.

1. The facts of this case will be found in the official

report. Under these facts, the trial judge did not err in refusing to grant a new trial. The evidence was conflicting as to the terms of the contract between Jackson & King and Davis; the jury believed the witnesses for Jackson & King, as they had the right to do; and the evidence of these witnesses fully established the contention of Jackson & King. The verdict, therefore, is not contrary to the evidence, nor strongly and decidedly against the weight of evidence, nor contrary to law and the principles of justice and equity, as complained of in the 1st, 2d and 3d grounds of the motion for a new trial.

2. The fourth ground of the motion complains that the verdict is contrary to a certain part of the charge of the court set out in the motion, and the 5th ground complains that this part of the charge was erroneous. These two grounds were not insisted upon either in the oral argument made before us or in the brief of counsel; and under the rulings in *Brown v. The State*, 82 Ga. 224, and *Parker v. Lanier*, *Id.* 216, we decline to pass upon these grounds.

3. The only remaining ground certified as true by the trial judge is the 7th, which complains that the court erred in denying the defendant's motion for nonsuit on the ground that the evidence showed that the plaintiffs had failed to carry out their contract, and also that they had accepted a promissory note in settlement of their claim, and therefore had no lien. The evidence for the plaintiffs in the court showed what the contract was, and that it was fully complied with on the part of Jackson & King. They testified that Davis was to pay them \$100 to recover the land from Morris; that they did obtain a decree compelling Morris to reconvey the land to Davis upon the payment by Davis of a certain sum of money; that they notified Davis of this and requested him to raise the money and tender it to Morris, and told



him that when this was done they would have Morris reconvey the land to him; that Davis neglected to raise the money within a reasonable time, and that they had their lien recorded. Davis testified that Jackson & King were to raise the money and pay it to Morris, and that they refused to do so. This testimony being in on the part of the plaintiffs, the court did not err in declining to grant a nonsuit on the ground that Jackson & King had failed to carry out their contract.

4. Nor did the court err in overruling the demurrer to the declaration, upon the ground that the declaration showed on its face that the plaintiffs had never fulfilled their contract and had filed their lien before completing the services they had agreed to render, and therefore could have no lien, as complained of in the exception *pendente lite*, on which error was assigned here. If the contract between the parties was as stated by Jackson and King, the court did right in overruling the demurrer. According to their statement of the terms of the contract, it was not their duty, but was the duty of Davis, to furnish the money which, under the decree, was to be tendered to Morris; and if Davis neglected to raise the money for this purpose, it would not deprive them of their lien. If they recovered the land in a suit in equity, and had nothing more to do than to procure a deed from Morris when Davis should raise the money to pay him, and if Davis neglected to raise the money within a reasonable time, their lien attached to the land as against Davis, and he could not divest it by declining or refusing to raise the money, or by delaying to do so until five or six months thereafter, and then paying it to Morris and employing another attorney to procure the deed from Morris and having the deed made to his wife and son instead of himself. According to the theory of Jackson & King (which was found to be true by the jury), their lien attached to the

land when the money was paid to Morris by Davis; and this distinguishes the facts of this case from the facts in the case of *Usry v. Usry*, 64 Ga. 579, relied upon by the defendant in error. In that case Samuel Usry had obtained a verdict against Peter Usry for four hundred acres of land, on the condition that he would refund to Peter Usry \$987.50. Samuel Usry failed to comply with the conditions of the verdict, and did not refund to Peter, or offer to do so, the amount of money required by the verdict; and this court held that Samuel's attorneys had no lien on the land as against Peter until Samuel had complied with the terms and conditions of the verdict, because the land still belonged to Peter; but the court said that when Samuel should become entitled to the possession of the land, his attorneys would then become entitled to a lien thereon for their fees. So in this case, it appearing that Davis had complied with the terms of the verdict and decree by paying to Morris what was due upon the land, his attorneys were entitled to their lien on the land, although he had the deed made to his wife and son.

5. It was also insisted that the court erred in not granting a nonsuit because Jackson & King had accepted a promissory note in settlement of their claim, and therefore had no lien. We know of no law in Georgia which would deprive an attorney of the lien given him by the code, if he takes the note of his client for his fee.

*Judgment affirmed.*

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THE RICHMOND & DANVILLE RAILROAD CO. v. ALLISON.

1. No fixed rule exists for estimating the amount of damages from permanent injuries to the person. The amount should be reasonable and just to both parties, and should compensate the injured one for the loss of money which he would probably earn had not the injuries occurred.

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86	145
89	509
86	145
112	926
86	145
128	246

2. While it is proper to prove the age, habits, health, occupation, expectation of life, ability to labor and the probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, it is improper to allow proof of a particular possibility, or even probability, of any increase of wages by appointment to a higher public office, especially where the appointment is somewhat controlled by political reasons.

November 10, 1890.

Damages. Evidence. Railroads. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

Action for damages. It was conceded by the defendant that the plaintiff was entitled to recover, and the only issue was as to the amount. The jury found for the plaintiff \$11,250, and the defendant moved for a new trial on the ground that the verdict was excessive, and on the two grounds fully set forth in the opinion. Other grounds therein referred to were as follows:

(6) The court charged: "Since the plaintiff would, if he had not been hurt, have received the fruits of his labor year by year as earned, but must now receive the sum awarded, if any, for permanent injuries, in cash all at once and by your verdict, it would be your duty to reduce the sum, when ascertained, to its present cash value." Error, in failing to explain what was meant by the reduction of the sum to its present value.

(7) In charging as to the mortality and annuity tables which were in evidence, the judge said that "the means of ascertaining the conclusions reached by pursuing their methods will appear to you upon examination of those tables." Error, because the tables only, without the note explanatory of them, had been introduced.

JACKSON & JACKSON, for plaintiff in error.

HOKE & BURTON SMITH, *contra*.

SIMMONS, Justice.

Allison sued the railroad company for damages, and obtained a verdict. The railroad company moved for

a new trial, upon several grounds, which will be found in the official report. The view we take of the case renders it unnecessary to discuss any of these grounds except the 5th and the 9th. The 5th is as follows:

Because the court erred in charging the jury as follows: "Another item of damages alleged by the plaintiff is for permanent injuries. He says that he has been permanently injured, and by reason thereof his capacity to work and earn money by his labor throughout his future life has been practically destroyed. If this be true, he would be entitled to further compensation on that account. The burden is on the plaintiff to show the fact that his capacity to labor and earn money has been permanently impaired, and the extent of such impairment, or to furnish *data* to the jury from which they may be able to ascertain his financial loss in this respect. In passing upon this question, you would ascertain from the evidence whether the plaintiff's capacity to labor and earn money is in point of fact practically destroyed, or in part impaired, by his injuries, and if so, the extent of such impairment, and whether it will extend to the future, and through the remainder of his life; and if you so find, you will award him such a sum as you think reasonable and just in view of the evidence and the extent of such injury, and in view of all the facts and circumstances of this case as disclosed to you in the evidence. If you believe from the evidence that the plaintiff has not suffered any permanent injury as the result of the injuries mentioned in the evidence, you would not allow him anything in the way of damages for a permanent injury. No fixed rule exists for estimating this sort of damage. The plaintiff's age, his habits, his strength, sex, vocation, the rate of wages earned by him in the past by his labor, his prospects of obtaining steady remunerative employment in the future, prospects of increased earnings in the future

by additional experience and skill required, if there be evidence on this point and that evidence in your opinion is definite and tangible, these circumstances, in so far as they may be illustrated by the evidence, are all circumstances proper to be taken into account."

The plaintiff in error objects to that portion of the charge set out which says, "No fixed rule exists for estimating this sort of damage," and insists that a fixed rule does exist, to wit: that such a sum should be allowed the plaintiff as would make his future income the same as it would have been had he not been injured, taking into consideration the probabilities of disease, decreased capacity to labor and the duration of life. It is insisted that the charge as given puts no limit upon the finding of the jury; that whilst it calls to their attention elements which they could consider, it does not restrict them by the fixation of a principle which should control their conclusion.

This court has considered this question upon different occasions, and in several cases has said that there is no "Procrustean rule," or fixed rule, in cases of this kind. See *Ga. Pac. Ry. Co. v. Freeman*, 83 Ga. 586; *Central R. Co. v. Thompson*, 76 Ga. 785; *S. F. & W. Ry. Co. v. Stewart*, 71 Ga. 428(1), 446; *Davis v. Central R. Co.*, 60 Ga. 329(4). The last case in which the question was considered was *Georgia Pacific Rwy. Co. v. Freeman*, *supra*, where the exact words complained of were approved by this court. Upon the request of counsel for the plaintiff in error, we allowed him to review that decision. We have carefully considered his argument, and have devoted much time to reading the text-books and reports of cases decided by other courts to ascertain if we could find any authority or decision holding that there is a fixed rule to be given to the jury which must control them in estimating the damages to a person who has been permanently injured by

the carelessness and negligence of a railroad company or natural person ; but we have been unable to find a decision of any court or a *dictum* of any text-writer holding that there is a fixed rule for measuring the damages in such cases. And in the nature of things it is impossible for a court to prescribe any fixed rule, because it is impossible to prove such exact *data* as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived if he had not been injured ; it is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness or the loss of an opportunity to labor ; it is impossible to say whether he would have continued to earn the same amount of money during his whole life, whether he would have earned more and how much more, or less and how much less ; whether he would have remained in the same occupation or would have abandoned that and pursued another more lucrative or less so. Unless these and other facts which might be enumerated could be shown the jury, we do not see how a fixed rule to measure the damages for a permanent injury could be prescribed to the jury. It may be said, however, that the life-tables put in evidence would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule ; but we do not think that this would in all cases be fair either to the plaintiff or to the railroad company. If the plaintiff were a young man of character, capacity and industry, and had chosen his occupation and commenced its pursuit, his yearly income at first might be small, but in a few years he might be able to increase it very largely ; yet, under the rule contended for, he would be confined during his life to the small income

he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person making a large yearly income, it would be unfair to the railroad company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; ~~because~~ our experience shows that a man in declining years ~~has not~~ ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability and indisposition to labor come upon him more and more each year as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the railroad company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule.

As was said by the Supreme Court of the United States in *Vicksburg, etc. R. Co. v. Putnam*, 118 U. S. 554: "It has never been held that the rules to be derived from such tables or computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much-considered case of *Phillips v. London & Southwestern Railway*, above cited, the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof." We therefore think that it is better for both parties to let the jury look at these things as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict as would be reasonable and just to both

parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured and thereby prevented by the negligence of the defendant. These remarks, of course, apply only to the measure of damages for the permanent injury. It is not contended that any fixed rule can be prescribed as a measure of damages for pain and suffering. We therefore reaffirm the ruling in *Georgia Pacific R. Co. v. Freeman*, *supra*. On this subject see 2 Thomp. Trials, §§2077-8; Redf. Rwys. 309 *et seq.*; 2 Wood Rwy. L. §317; Whit. Smith Neg. 474; Pierce R. R. 301; Smith Dam. 382 *et seq.*; 2 Shearm. & Redf. §758; Wood's Mayne Dam. 596, §627; 2 Sedg. Meas. Dam. 547; Pollock Torts, \*161-2; Field Dam. 614-15.

The 9th ground complains that the court erred in admitting the following evidence over the objection of counsel for the defendant, to wit: "Q. How soon after his injury (referring to Mr. Allison) were there any vacancies to which promotions could have taken place? A. Vacancies were shortly afterwards,—say certainly in the course of the next three to six months, I think, after Allison was hurt. According to Mr. Allison's standing and the classification which I give, his prospects for promotion to one of these places was good." The defendant objected to this testimony and all other evidence of the witness tending to show prospects of promotion, as being simply the opinion of the witness and showing a possibility too remote to be the basis of consideration by the jury in finding damages. We think this exception is well-taken, and that the court erred in allowing the testimony complained of to go to the jury. The testimony of this witness shows, in substance, that he was the assistant superintendent of the railway mail service of the fourth division; that Allison was a postal clerk under him, and that he had special supervision of



Allison's record and work; that the next class above Allison in the line of promotion at the time he was injured was "Class 5," and that the salary in that class was \$1,300 a year; that Allison was receiving when injured \$1,150; that Allison's standing in regard to the basis of promotion was "first-class"; that there was no vacancy in the class above Allison at the time he was injured, but two vacancies occurred in the course of from three to six months thereafter; that there were three men of Allison's class, including Allison, and that the other two stood as well as he did, and both were older than Allison; one had been in the service longer and the other a shorter time than Allison; political considerations enter somewhat into the appointment of clerks; the promoting power is at Washington, the office here is the recommending power; a vacancy in the class above Allison might be filled sometimes from other routes, and men taken from another route and put in who occupy, say, a second rank; it is in the power of the department under the rules to do that. There is no certainty at all where there is a vacancy in the position of chief clerk—the clerk in charge—that one of a lower grade on the same route will go up,—no more than in any other business; it is not guaranteed.

We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from \$1,150 to \$1,300 too remote, to go to the jury and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, espe-

cially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy-clerk of this court, for example, is very efficient and faithful, and if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the *personnel* of the court, upon which such appointment must depend, might change in the meantime. To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received and which is merely in expectancy and might never be received, or if received at all might come to him at some remote and uncertain period, would be wrong and unjust to the defendant. We believe the rule of most of the railroads in this State is to promote their employees. An employee commences at the lowest grade, and if he is competent, capable and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary which he had never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been

preferred to each of ~~them~~ in case of vacancy, and promoted above them; so it could not be said that he was in the direct line of promotion. Pierce Railroads, 303; Brown v. Cummings, 7 Allen, 509; Boyce v. Bayliffe, 1 Camp. 58; Brown v. Railroad Co., 64 Iowa, 656.

This testimony being illegal, and having been objected to, and it being very probable from the amount of the verdict that the jury based their calculation upon the increased salary which Allison would have received if he had been promoted, we think it damaged the defendant, and we grant a new trial upon this ground.

The other grounds of the motion we will not discuss, except to say that if there are any errors contained therein, the court below will doubtless correct them on the next trial. If the explanations of the mortuary and annuity tables were not put before the jury, this can be done at the next trial if counsel so desire. The same may be said as to the failure of the court to explain to the jury what was meant by the reduction of the sum, when ascertained, to its present cash value, which is complained of as error in the 6th ground of the motion. If counsel desires more specific instructions at the next trial, he can request the court to give them.

*Judgment reversed.*

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TAYLOR v. BLILEY.

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A partner who entered the business under contract that in consideration of a sum (about half the value) which he paid at once, and of another sum to be paid in a year, he should have a half undivided interest in property theretofore owned by the other partner, the title to the same to remain in the other partner until the balance of money should be paid, had sufficient interest in the property delivered to him to authorize him to maintain a petition for injunction and receiver against the other partner, the time payment not being due, and the partnership having gone into operation.

November 10, 1890.

Partnership. Injunction and receiver. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term (September 6), 1890.

Taylor, on August 16, 1890, by his petition made these allegations: On January 22, 1890, he and Bliley entered into a written agreement attached. Bliley had been in the business of an undertaker, and had an outfit used in carrying on the business, which he valued at \$2,594.30. He contracted to sell to petitioner a half-interest in this property for \$1,267.45, the title to remain in Bliley until the purchase money was paid. Petitioner paid in cash \$600, and gave his note for \$667.45. The firm entered at once upon the business, which progressed very slowly, the income from it being very small, so that since the partnership was formed petitioner has received from the business only \$22. Feeling that the business was dull and that there was no likelihood of a support from it, he applied to Bliley three months ago to dissolve the partnership, proposing that if Bliley would let him have back his \$600 and the note, he would give him all his time and labor up to that time, but Bliley refused to entertain the proposition; the petitioner then proposed to take \$350 and the note and leave the business, but this Bliley refused to do; and so petitioner gave Bliley notice that he would in three months dissolve the partnership. The three months have elapsed, but Bliley seems more inexorable than ever, keeping the books locked up and concealed from petitioner, refusing to consult with him about the business or talk about his interest in the matter, and in every way trying to ignore him. Bliley is morose and grum and at times insulting to petitioner, and considers the business as his exclusively. If there were more profits in the business than would be indicated by the amount above stated as having been paid petitioner, he has no way of ascertaining it, as he is

almost entirely excluded from any knowledge of the business. The firm has been sued for the rent of the building it occupies, and, indeed, things seem to be in such a strait that it is necessary the business should be in some way terminated. Even as late as the day before the petition was sworn to, Bliley locked up the house and went away, leaving petitioner sitting at the door. He cannot state accurately the debts of the firm, as he has not been allowed any acquaintance with the same by Bliley, but he knows that it owes several hundred dollars. He prayed that Bliley be enjoined from further proceeding with the business; that a receiver be appointed to take charge of it to the end that it may be settled up and the partnership dissolved, and the rights of the parties adjusted; that he be paid the \$600 which he put into the business, and the note which he executed be delivered up to him and cancelled, and Bliley be enjoined from selling it; that if there are any profits in the business, he be given his part of them under the contract, etc. The contract attached as an exhibit was, that in consideration of \$1,267.45, \$600 of that sum cash in hand, and the balance to be paid in twelve months from date (as evidenced by note of even date with the contract, signed by Taylor and Mrs. Taylor), Bliley conveyed conditionally to Taylor one half undivided interest in the property specified in a schedule which followed, the title to said undivided half-interest to remain in Bliley until the balance of the consideration should be fully paid, and then to vest absolutely in Taylor. It is further stated that the parties had that day formed a partnership to conduct the undertaker's business under the name of Bliley & Taylor; the profits of said business to be equally divided between them. The schedule referred to contained a list of the articles in the undertaking outfit. By amendment petitioner charged that since he filed his petition, he

had learned that Bliley had mortgaged the partnership property for \$550, and had also ascertained that Bliley gave in his entire property for taxation at \$1,600, which amount is much less than petitioner thought it was worth, and might be covered by a homestead; that since he filed the petition, Bliley had told him that he should not have a cent of the money that he put into the firm, nor should he have anything for his services, and that when the property was brought to sale he intended to see that it did not bring enough to pay him anything; that Bliley peremptorily and insolently orders him out of the store and tells him that he shall not come into it, so that to keep the peace he has for several days remained away, thus necessarily leaving everything in the hands of a man whom he believes to be totally unscrupulous; that he feels warranted in this latter statement, because he is credibly informed that, in severing his connection with a firm in the same business, Bliley cut out the leaves of a book on which his individual account appeared.

Bliley answered as follows: Some weeks before the partnership was formed, Taylor and his mother importuned him to take Taylor in his business as a partner, assuring him that Taylor would devote his whole time and energy to the business and would do all he could to make it a success. He finally agreed to sell Taylor a half-interest in the property and admit him as a partner upon the terms contained in the agreement referred to in the petition. Respondent has faithfully attended to the business and devoted his whole time to it, but Taylor has been a detriment rather than a help, by reason of his neglect and his actions in and around the place of business. Taylor has been almost continuously under the influence of whiskey or some other intoxicant, since the 22d of January, 1890; at times he would get drunk and absent himself from the place of

business for days at a time, and respondent would not know where he was and would have the whole care of the business on himself. When Taylor was drinking, he made himself very disagreeable by using profane language in the place of business, and would often sit in front of it in a semi-stupor or sleep, and be anything but an attractive or profitable advertisement, so that respondent's friends would call his attention to Taylor's condition and suggest that it would be better if Taylor would retire from sight. He from time to time remonstrated with Taylor and felt constrained to ask him to please not sit in front when under the influence of liquor, and often asked him to go into the back room and lie down until he got more sober. Notwithstanding all this, as the partnership has been entered into for twelve months, he feels it his duty to carry out the agreement in good faith. It is not true that he denies Taylor access to the books or considers the business as his exclusively; the books are kept in the place of business at a place of which Taylor is aware, and respondent does not try to conceal them from him or exercise any more dominion over them than is necessary to take proper care of them. It is untrue that he refused to talk about the business of the firm, except when Taylor was under the influence of liquor. He never intended to insult Taylor, and when he remonstrated with him he only desired that Taylor might do better, and the business should appear to be in respectable hands. The persons who have patronized the firm are almost exclusively respondent's friends. Taylor was away from and neglected the business so much, and was under the influence of liquor so much of the time, that respondent felt it was necessary to look after the details of the business, see that accounts were collected, bills paid, etc.; and in doing so he did not attempt to prohibit Taylor from doing the same. There is a suit

pending against respondent as a tenant holding over, but he has interposed his defence and is advised that it is a good one. The firm is indebted, but the amounts due it are about equal to its indebtedness. The income has not been sufficient to pay the expenses of the business, and he has paid out of his own pocket money to satisfy firm indebtedness, so that the firm is indebted to him while Taylor is indebted to the firm, and there are no profits in his hands to which Taylor is entitled. The firm is solvent, its assets being sufficient to pay all its indebtedness. If respondent ever gets the balance of the purchase money represented by Taylor's note, it will be by sale of the property mentioned in the agreement, or out of the profits of the business, as Taylor is insolvent. He did, a few days before, lock the door of their place of business while petitioner was sitting close by, but he did this because there was a corpse lying in the place of business, and he felt it was not safe and proper to leave the door open, knowing that he could not trust Taylor by reason of Taylor's habits, but Taylor had a key to the door and could go in if he wished to. Taylor is welcome to exercise such dominion over the books and over the firm as a partner is entitled to, and respondent will not try to prevent him. The appointment of a receiver would be disastrous to respondent, because Taylor still owes the note. The agreement with Taylor was that his mother was to sign the note, and she has never done it. If the property should be sold at receiver's sale, it would be sacrificed, and Taylor's portion, if he were entitled to any portion of the proceeds, would not be sufficient to pay the note. When respondent purchased his outfit to run his undertaking business, he gave a mortgage to secure the payment of the purchase money to L. H. Hall & Co., and after he gave it, continued to run an account with Hall & Co.; and when



he formed the partnership with Taylor, he owed Hall & Co. about \$550 on the account; and about three months after the partnership was formed, in a settlement with Hall & Co., he took up the mortgage and renewed it for \$550. He knew his interest in the property was ample to pay the \$550, and acted in perfect good faith towards Taylor. He had plenty of property to pay his debts, and the mortgage is due when Taylor's note is due, the mortgage being given on the belief that Taylor's note would pay the debt; and Hall & Co. were informed of respondent's plans and assented to them. Respondent was a member of the firm of D. G. Wylie & Co., and when he was about to sever his connection with that firm, he rendered his account; and there being dissatisfaction about the account, the books of that firm were examined by two persons, each of whom reported that the firm owed respondent more than respondent claimed at first, and on the last report a settlement was made, and he left the firm. He does not remember to have taken the leaves on which his individual account appeared, but after this settlement was made he had a perfect right to them. He is amply solvent and intends to carry out the agreement between him and Taylor; the appointment of a receiver would be very hurtful to his business reputation, etc., etc.

On the hearing of the application for injunction and receiver, the evidence for the petitioner tended to show that the manner of Bliley towards Taylor was frequently gruff and insulting and unpleasant; that Taylor was closely attentive to his business, sober, and at his place of business, and always pleasant and forbearing; that he had never been so intoxicated as to incapacitate him for business while he was a partner with Bliley; that the allegations in Bliley's answer to the effect that he was so intoxicated, and similar allegations,

were false; that Bliley represented to him that there was no incumbrance upon the property, and that the firm owed no debts; that in winding up the business of D. G. Wylie & Co., the leaves containing the individual account of Bliley had been cut out from the book in which the account appeared; that Taylor, on May 15, 1890, served Bliley with a written notice to dissolve the partnership; and that at times Bliley was morose and hard to get along with, and at other times pleasant; he had been known to be absent from the place of business frequently, and to have refused to give Taylor money.

The testimony for the defendant tended to show that he was always present at the place of business and attentive to the same, while Taylor was seldom present, but was frequently drunk or under the influence of liquor, and was often absent when defendant required his assistance in the preparation of coffins, etc., and was often seen sitting in front of the place of business evidently under the influence of liquor, while defendant is steady, industrious, sober and of unimpeachable character; that the books of the firm were always accessible to Taylor; that he had been heard to refuse defendant's request to assist him in the business, saying that he was not going to have a damned thing to do with it and was going to get out of the business any way; that he returned no property for taxation for 1889 or 1890; that defendant refused to let him have money on the occasion above referred to, because he was under the influence of liquor and wanted to bet on a horse-race; that defendant always treated him kindly and with extra patience and consideration; and that the defendant was the one to whom bills for carriages to attend funerals were presented, and by whom they were paid. The witness who had testified for Taylor as to the missing leaves containing Bliley's individual ac-

count with Wylie & Co., testified that he signed the affidavit for Taylor's counsel without sufficient consideration, and now says that when Bliley went out of the firm of Wylie & Co. he rendered his account for a certain sum, and Wylie was dissatisfied, and deponent then went over the same and rendered Bliley's account for more than Bliley had, and then another person named ran over the books and rendered Bliley's account for more than deponent had, and the settlement with Bliley was made on the basis of the latter report; that deponent does not pretend to say who cut out the leaves of the book; that Bliley, like other men, is not so pleasant at some times as at others when not worried, and is an average man in this respect; and that deponent regards him, from business acquaintance and experience, as a man of integrity and strictly honest.

The judge denied the prayer for injunction and receiver, on the ground that the title to the property described in the contract was in the defendant, and that this being true, there was nothing in the facts shown in evidence to authorize the granting of an injunction and the appointment of a receiver. The plaintiff excepted.

P. L. MYNATT & SON, for plaintiff.

O'NEILL & FRAZER, by brief, for defendant.

SIMMONS, Justice.

The facts will be found in the official report. Under these facts, we think the trial judge erred in refusing an injunction for the reasons set out in his judgment. That judgment is based upon the idea that the title to the property described in the contract was in the defendant, and that the plaintiff, therefore, was not entitled to an injunction or the appointment of a receiver. We differ from the learned judge upon this question. Under the facts, we think that the plaintiff had sufficient

interest in the property to authorize him to file the bill and have an injunction and receiver, if there was no other difficulty in the way. He had paid about half the price of the property which had been delivered to him as a partner, and the partnership had gone into operation. While Bliley may have had the legal title to the property, Taylor had such an equitable interest as would authorize him to retain it in his possession, especially when the notes for the purchase money which Taylor had given to Bliley for the other half had not become due. If Bliley had sold the property to Taylor individually and delivered it to him, Taylor certainly could have held it against Bliley until he had refused to pay the balance of the purchase money. As the trial judge put his judgment upon an erroneous construction of the contract, and did not exercise his discretion upon the merits of the case, we reverse the judgment and direct that the plaintiff, if he sees proper, may apply again to the judge and have him exercise his discretion upon the merits of the case.

*Judgment reversed.*

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BLILEY v. TAYLOR.

Injunction and receiver. Practice.

- LUMPKIN, J.—1. Where the evidence was conflicting, and no abuse of discretion by the judge below in appointing a receiver appears, this court will not disturb his judgment.
2. Where a receiver of the assets of a partnership was appointed, and the failure of the judge to appoint a member of the firm, such receiver is assigned as error, and it appears that no request or prayer was made to him that such member should be so appointed, the propriety or impropriety of such failure is not before this court for adjudication.

*Judgment affirmed.*

March 16, 1891.

After the decision delivered by Justice SIMMONS, above reported, this case was again heard by Judge CLARKE, on November 22, 1890, and the same evi-

dence as already reported, with the following in addition, was introduced: The defendant testified that Taylor had taken no interest in the business, nor assisted in carrying it on since the 15th of May, 1890, and had not been about the place of business for over three months previous to the 22d of November, 1890; and that if the whole of the property, including the firm accounts, be sold by a receiver, the same will not sell for more than \$900 or \$1,000. The estimate of another witness was about \$100 less. The defendant also submitted a statement which he swore to be a true and full account of the receipts and expenditures of the firm, taken from its books, to August 15, 1890, commencing January 22, 1890. This shows a total of charges for burial-cases, services, etc., amounting to \$1,034.10, of which \$646.10 had been collected and \$484 remained due. Bills amounting to \$660.57 had been paid to creditors, and \$476.68 were due by the firm to divers creditors. Taylor is debited to cash \$33.90, and \$14.47 are stated to be due Bliley. The estimated value of the business when Taylor purchased a half-interest, was \$2,534.90; the increase of stock since the 22d of January, 1890, was \$74.20; and the amount of cash in bank was \$51.62. The items of the amounts due to and by the firm are given.

The judge passed an order enjoining the defendant from collecting the note made to him by Taylor and from proceeding further with the business, and ordering that he turn over the possession of all the partnership property to W. F. Parkhurst, who is hereby appointed receiver and is authorized to proceed with the firm business, after giving a \$2,500 bond. The defendant excepted to this judgment, because (1) the judge appointed a receiver, and (2) he appointed Parkhurst and not Bliley under proper bond.

O'NEILL & FRAZER, for plaintiff in error.

P. L. MYNATT, *contra*.

## THE CITY COUNCIL OF AUGUSTA v. LOMBARD.

86	165
87	649
88	165
125	389

Where the action is against one defendant only, a writ of error will lie to a judgment overruling a general demurrer to the declaration, although the case is still pending in the court below.

November 10, 1890.

Practice in Supreme Court.

Reported in the decision.

JOHN S. DAVIDSON, for plaintiff in error.

TWIGGS & VERDERY, *contra*.

BLECKLEY, Chief Justice.

The case below was an action at law for damages. The declaration was demurred to generally at the appearance term. At a subsequent term the case came on to be heard "on the trial of said demurrer." The plaintiff amended the declaration, and thereupon the court overruled the demurrer. This was on the 4th of February, and on the 10th of February, 1890, the bill of exceptions was signed and certified. The errors alleged are that the court erred in allowing the amendment and in overruling the demurrer. On the call of the case here, counsel for the defendant in error moved to dismiss the writ of error because the case is still pending in the court below. On the argument of the motion some collateral facts were stated by counsel, and were admitted by opposing counsel to be correctly stated. But we find none of them set forth in the bill of exceptions, and consequently cannot make an authoritative ruling with them as a basis. We therefore leave them out of consideration altogether.

The pendency of the case below is no obstacle to a writ of error, where the decision complained of, "if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the case." Code, §4250. Had the general demurrer to the declaration,

which the court overruled, been sustained, the action below would have been finally disposed of. It is manifest, therefore, that this writ of error was not prematurely brought. *Central R. R. v. Denson*, 83 Ga. 267.

*Motion denied.*

NOTE.—The writ of error was then withdrawn.

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MANDELL *et al.* *v.* FULCHER, administrator.

1. The question being whether certain lands which the administrator held were assets of his intestate and therefore liable for the payment of the debts of the latter, or whether they were first liable for the payment of debts contracted by his wife, the administrator contending that his intestate took the land by inheritance from her, and that at the time of her death the property was charged with the payment of debts due by her to the administrator and others; and the administrator having testified that he was the owner of a note signed by her and his intestate which had been lost, and having shown by other witnesses that they had seen such a note in his hands and that the paper presented was a true copy, in substance, of the original, which was in the handwriting of the intestate and his wife, the copy was admissible in evidence.
2. Touching certain issues in the case, particularly as to the amount of money that might be due by the intestate's wife to the administrator, a sheriff's deed conveying a large body of land, including that in question, to the administrator, after sale under executions for State and county taxes for several years against the intestate as trustee, and a subsequent deed from the administrator to his intestate's wife conveying this land, were admissible in evidence; they being offered to show title to this land in the wife, and it being admitted by the administrator that this was the title on which he relied, and that his intestate had never been the trustee of the property under any written appointment. Whether or not the levy and sale were void for excess, they were recognized as correct by the wife, who owned the land in part at least; and whether her purchase from the administrator amounted to a redemption need not be considered.
3. A note written by a former attorney of the wife, to the effect that she wished to borrow money on the land, was objectionable as sayings of a third person unconnected with this case, it not appearing that he had any authority to write such a note.
4. Requests to charge which were inapplicable, immaterial or unsupported by evidence, were properly denied.

5. If there be errors in the charge as given, they ought not to cause the setting aside of the verdict, which was right according to the evidence.

November 12, 1890.

Estates. Administrators. Evidence. Title. Deeds. Redemption. Levy. Trusts. Charge of court. Husband and wife. Tax. Practice. Before Judge RONEY. Richmond superior court. October adjourned term, 1889.

For the previous parts of this litigation see 55 *Ga.* 68, and 83 *Ga.* 715.

FRANK H. MILLER, for plaintiffs.

W. W. MONTGOMERY, for defendant.

BLANDFORD, Justice.

The question in this case was, whether certain lands which James A. Fulcher held in his hands as the administrator of Armstead A. Fulcher (deceased) were assets of the deceased and therefore liable for the payment of his debts, or whether the land was first liable for the payment of debts contracted by the wife of the deceased before the same became liable for the payment of the debts due by deceased. The defendant in error contended that Armstead A. Fulcher took this land by inheritance from his deceased wife, Mary A. Fulcher, and that at the time of her death this property was charged with the payment of certain debts due by the said Mary A. Fulcher to himself and others, amounting to the sum of \$1,300.00. Upon the trial of the case James A. Fulcher, the administrator, testified that he was the owner of a certain promissory note for \$1,000.00; that the same had been lost; and he offered testimony by other witnesses to show that they had seen such a note in the hands of himself, signed by the said Mary A. Fulcher and Armstead A. Fulcher, her husband. Another witness was introduced who testified that he had seen the original note which was said



to have been lost, and that the copy presented was a true copy, in substance, of the original; that he was acquainted with the handwriting of Mary A. Fulcher and Armstead A. Fulcher, and that said original note was in their handwriting. Defendant in error then offered the copy note in evidence, which was objected to by counsel for the plaintiffs in error. The objection was overruled, and this is one of the first assignments of error. We can see no error in the admission of the copy note in evidence with the proofs accompanying the same.

Defendant then offered, as evidence to show title to this land in Mary A. Fulcher, executions for State and county taxes for several years against A. A. Fulcher, trustee, with levies of them upon 750 acres of land, including the land in question, together with a sheriff's deed made February 4th, 1879, conveying the land to J. A. Fulcher by virtue of a sale made under these levies. These executions amounted to \$166.75. Also, a deed from J. A. Fulcher to Mary A. Fulcher, dated February 5th, 1880, conveying this land, the consideration therein stated being \$212.81. It was admitted by defendant's counsel that this was the title upon which he relied, and that Armstead A. Fulcher had never been the trustee of the property under any written appointment. This evidence was objected to, upon the ground that the sheriff's deed was void on its face in conveying so large a tract of land for so small a consideration; and afterwards, when it was admitted over this objection, plaintiffs moved to exclude it upon this same ground and on the additional ground that the two deeds, to wit, the deed from the sheriff to J. A. Fulcher and from J. A. Fulcher to Mary A. Fulcher, amounted to a redemption of the property by Mary A. Fulcher. The court overruled this objection, and admitted the evidence. We think the testimony was admissible, as

it bore on some of the issues of the case, particularly as to any amount of money which might be due by Mary A. to James A. Fulcher. Whether this levy and sale by the sheriff was void on account of being excessive or not, Mary A. Fulcher, who was the owner of this land, in part at least, recognized the levy and sale as correct; and whether her purchase from James A. Fulcher amounted to a redemption of the property, it is unnecessary for us now to consider. If the contention of counsel for the plaintiffs in error be correct, that deed was void; and if not void, then nothing passed under it but the life estate of Mrs. Fulcher, and at her death, which occurred before that of her husband, her individual rights under the deed from the sheriff to J. A. Fulcher and from J. A. to her terminated, and the property then passed under the provision of the original trust deed from Fulcher to Boyd absolutely as to one half thereof to Armstead Fulcher, free from the claims of the said Mary A. We cannot see how this testimony in any way injured the plaintiffs in error. We understand that the trust deed from Armstead Fulcher to Boyd, as trustee, conveyed this land to Boyd for the use of Armstead and Mary A. Fulcher during their joint lives, and for the use of Armstead during his life, and at his death one undivided half thereof to go to his wife, Mary A. So when Mary A. died, the title passed to Armstead in fee, he and the said Mary A. having no children; but if the property was encumbered with debts at the time of the death of Mary A., which she had contracted for supplies for herself and husband, then her husband (Armstead) could not have a title to this land until those debts were paid, and he died shortly thereafter. And if the value of the estate which Armstead Fulcher received in consequence of the death of his wife did not exceed the amount of the indebtedness of the wife at the time, then there

could be nothing in the hands of the administrator, James A. Fulcher, subject to the payment of the debts of Armstead A. Fulcher. The debts of Mary A. Fulcher were a charge upon this land which were to be paid before any debt of Armstead Fulcher. We do not very clearly perceive why the plaintiffs in error should have objected to this testimony.

A certain note, written by a former attorney of Mrs. Fulcher, to the effect that she wished to borrow money on her land at McBean (the land in question appearing from the deed to be situated near McBean station), was offered in evidence by the plaintiffs in error, to the introduction of which the defendant in error objected. The court sustained the objection, and plaintiffs excepted. We think the court was right to rule out this testimony. It was nothing but the sayings of a third person in no way connected with this case, it not appearing that the attorney had any authority or power to write such a note.

Complaint is made because of the refusal of the court to give certain requests to charge made by the plaintiffs in error, as follows :

(1) "The note dated October 24, 1885, is joint and several as to its terms, but by the consideration recited therein is joint. If you find that the supplies were furnished for the joint use of Fulcher and his wife, the debt as to the supplies is the husband's alone." We think this request was properly refused by the court. By the very terms of the deed of settlement made by Armstead Fulcher to Boyd, as trustee, he had a right to be supported out of that estate; and if the trustee ceased to act, and the wife acted in that behalf, she was bound to furnish supplies for her husband's use.

(2) "If it appears from the evidence that any portion of the indebtedness represented by the note was that of Armstead Fulcher individually, and that the same was

consolidated with a claim against the wife, then the note as a whole is void." We think this request was also properly refused, as there was no evidence to show that any part of the debt of Armstead Fulcher individually was consolidated with the claim against the wife, except the debt of Armstead Fulcher before the trust deed was made to Boyd. This was an incumbrance on the property conveyed by the trust deed, and Mary A. could incur a debt to remove this incumbrance, and it would be her debt.

(3) "If the property is sold under a tax *fi. fa.* against a trustee, and bid off by a purchaser who knows of the trust and conveys the property back to the life tenant, the same amounts in law to a redemption of the property and vests the title as it stood before." Whether or not this request was proper to be given to the jury, is wholly immaterial under the facts in this record; and so with the fourth request, which is as follows:

(4) "That under the sheriff's deed of February 4th, 1879, to J. A. Fulcher, nothing passed but the life estate of Mrs. Fulcher and Armstead Fulcher, and that when J. A. Fulcher reconveyed to M. A. Fulcher, he only conveyed back to her her life estate and nothing more."

It is complained that the court erred in charging the jury, at the request of defendant in error, as follows: "A sale of property by the sheriff under tax *fi. fa.* and a failure to redeem the property by the delinquent tax-payer within twelve months by paying the purchaser at such sale the purchase money and ten per cent. on it, conveys the absolute fee simple title to said purchaser divested of all former trusts which have covered the property before the sale." While we are not prepared to admit that this charge of itself is correct, yet we cannot see how it affected the plaintiffs in any way whatever.

Again, exception is taken to the following charge which was given by the court at the request of defend-

ant's counsel: "If the jury find that the land levied on was bought by the defendant at a tax sale, and deeded the same to Mrs. Fulcher; that afterwards she, jointly with her husband, gave defendant a note for land and supplies, she signing the note first, then the note is a debt of the wife and must be paid before said land can be appropriated to the payment of her husband's debts." We do not perceive the vice in this charge, construed in the light of the evidence.

Plaintiffs in error further except to the following request to charge made by defendant in error: "Where a note is given, a consideration is presumed; the holder is not required to show it." This, abstractly, is a correct proposition of law, and we do not see why it is not correct as applied to this case.

Exception is taken also to the following charge of the court, given at request of defendant's counsel: "A note sued on cannot be denied except on oath." Abstractly, this is a correct charge, but its applicability to this case is much to be doubted, and in a close case upon the facts we would be inclined to reverse the judgment. But inasmuch as this case has been here several times before, and has also been tried by a jury, and we are satisfied that the verdict of the jury was right according to the evidence in the case, we do not feel disposed to reverse the case for this error. *Judgment affirmed.*

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THE PORT ROYAL & W. C. RAILWAY CO. v. GRIFFIN.

1. There being sufficient evidence to authorize the verdict, this court will not interfere with the judgment refusing a new trial, though it might not have rendered the same verdict.
2. It appearing that the plaintiff was absent from her home when the fire began, for causing which she brought suit, and it not appearing that she had any part or lot in it, a ground for new trial that the jury failed to consider the contributory negligence on her part is not tenable.

3. A charge that "when a witness swears wilfully and knowingly false to a material allegation, then it is the right of the jury to disregard the testimony of such witness," does not imply that the jury has a right to believe a proved falsehood, the charge further stating that where a witness has been impeached by showing that what he swore to was false in some particulars, the jury may disregard his testimony as to all other facts testified to by him, unless corroborated by other circumstances.
4. A charge that "if you are satisfied that the fire originated in some other way than from the engine, then return a verdict for the defendant," does not imply that if the fire did originate from the engine, the company is liable without the further proof that it occurred by reason of the negligence alleged, that is, in not having spark-arresters and fire-boxes, and in suffering the track to be covered with rubbish.
5. If correct instructions by the court to the jury be not full enough, further instructions may be requested.

November 12, 1890.

Negligence. Verdict. Railroads. Witness. Charge of court. Before Judge EVE. City court of Richmond county. November term, 1889.

Mrs. Griffin sued the railway company for damages which she alleged she sustained by the burning of timber and fencing on her land, caused by a spark or sparks from the engine of defendant. She alleged that the injuries were caused by the negligence of defendant in not having approved spark-arresters and fire-boxes on its engine, by the careless and unskilful manner of running and operating the same, and by defendant's negligence in suffering a large quantity of dry pine straw and grass and other rubbish to accumulate on its tracks and right of way through her premises, by means of which fire was communicated to her land, etc. Defendant pleaded not guilty.

The evidence for the plaintiff tended to show that she owns land through which defendant's railroad runs for something over a mile; that on May 22, 1889, from 125 to 150 acres of this land were burned off, the fire occurring on a very windy day; that the defendant's right of way was very foul, being covered with litter and

pine straw, and there being some litter between the cross-ties; that by the fire about one mile and a quarter of plaintiff's pasture fence was burned, between thirty-five and forty cords of cut wood, and about sixty cords of growing timber to the acre; that the fence was in good repair and it was worth about \$350 to rebuild it; that the cut wood was worth \$1 a cord and the growing timber worth about \$30 per acre; and that the total loss was from \$1,200 to \$1,500. This estimate was that of one witness, the plaintiff's son. He further testified that he did not reach the fire until evening; that it had burned right up to the railroad; that he found a pile of cross-ties burning that had been piled to one side of the road; and that some of the ties in the railroad were on fire. Other witnesses for plaintiff estimated the damage at considerably less, one of them at very greatly less. Her counsel claimed to have been entrapped by this witness, and was allowed to introduce testimony tending to show that the witness had made statements giving a much higher estimate of the damage, and quite contrary to what he stated on the stand. Other evidence tended to show that the fire was caused by defendant's train or engine, and was kindled about the time this train passed, which was about mid-day; and that plaintiff did not know of the fire. The fire lasted three days and burned rapidly. It does not appear that any effort was made to extinguish it.

The testimony for the defendant tended to show that the land was returned for taxes at \$3 per acre; that the fire was not caused by defendant's engine or agency at all, but caught at a point distant from and burned towards the railroad, the wind being in the direction of the railroad from the fire; that defendant's track was kept reasonably clean, but it did not cut the grass off its right of way; that the fire-boxes and smoke-stack of the engine were in proper condition and

emitted no sparks, at least no large sparks; that the engine in question never drops fire; that it was going up a heavy grade when passing through plaintiff's land, and more sparks fly when it is going up grade; that the damage to plaintiff was small; that the right of way had been burned off in the spring before this fire, and also in the spring of the previous year; that defendant's section-master reached the place at about seven o'clock in the evening and found fire in the pile of cross-ties, reaching two or three hundred yards along the track, touching the track nowhere but opposite the pile of ties; that there was no great amount of straw or trash and no timber at this point; that there was no fire at all within about forty yards of the ties, and it was three days from the time it was at this point until the fire burned down; and that there was no effort to put out the fire by plaintiff or any of her party, that the section-master knew of. There was testimony tending to impeach some of the plaintiff's witnesses.

The jury, on December 2, 1889, found for the plaintiff \$606 damages, with interest from May 22, 1889. The plaintiff voluntarily wrote off the interest. To the refusal of a new trial the defendant excepted.

J. GANAHL, for plaintiff in error.

TWIGGS & VERDERY, *contra*.

BLANDFORD, Justice.

A verdict was had for the defendant in error in the court below. The railway company moved for a new trial, which was denied. The first two grounds of the motion are the usual ones, that the verdict of the jury is contrary to the evidence, without evidence to support it, etc. We cannot agree with the learned counsel for the plaintiff in error who argued this case. We think there was sufficient evidence to authorize the verdict of the jury. While we might not have rendered the same



verdict had we been on the jury, yet, when the jury had evidence upon which to base their verdict, and the court below was satisfied with it, we do not feel authorized to interfere therewith.

The next ground contended for by the plaintiff in error is, that the jury failed to consider the contributory negligence on the part of the defendant in error. We have considered this case very carefully, and we do not see how the defendant in error in any way contributed to the injury she received from fire. She was not at home or near by when the fire began, and it does not appear that she had any part or lot in it.

It is complained further that the court erred in charging the jury as follows: "When a witness swears wilfully and knowingly false to a material allegation, then it is the right of the jury to disregard the testimony of such witness." It is insisted that the implication in this charge that the jury had a right to believe a proved falsehood is stronger than the assertion that they had a right to disregard it. The statement by the court objected to is, to our minds, a clear statement of the law as far as it goes; and if any further statement should have been made by the court to the jury, the same should have been requested by counsel who now complain. In looking at the charge itself, we see that the court did state to the jury that where a witness has been impeached by showing that what he swore to was false in some particulars, they might disregard his testimony as to all other facts testified to by him unless corroborated by other circumstances.

Error is assigned also in the following charge of the court: "If you are satisfied that the fire originated in some other way than from the engine, then return a verdict for the defendant." It is insisted that this charge implies that if the fire did originate from the engine, the company was liable without the further

proof that it occurred by reason of the negligences set out in the petition, that is, in not having approved spark-arresters and fire-boxes, and in suffering the track to be covered with rubbish. We do not think this charge is liable to the implication sought to be engrafted upon it; and besides, plaintiff in error did not ask any further instructions to the jury than were given.

The judgment of the court below is therefore

*Affirmed.*

### BELDING v. JOHNSON *et al.*

The suit being by a widow against a barkeeper for damages for the homicide of her husband who was killed in the defendant's bar-room, and it being alleged that he sold liquor to the deceased and his slayer in the forenoon, and that the quarrel between these two then originated in regard to a wager they had made, but the homicide not having occurred until the afternoon, when the deceased again entered the bar-room, not as a customer or guest, but to obtain the watch he had wagered to the slayer, the defendant cannot be held liable because he furnished liquor to the slayer when drunk and failed to protect the deceased against him.

November 12, 1890.

Torts. Negligence. Damages. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

Mrs. Belding, as the wife of Neal Belding, sued Johnson and Whitlock for \$20,000 damages, making the following allegations: About nine o'clock in the morning of April 26, 1889, her husband and Whitlock met in the bar-room of Johnson and drank intoxicating liquors together, and soon became engaged in a dispute which ended at that meeting in the bet of a watch, which her husband agreed, at the suggestion of Whitlock, should be held by one Sloan, a clerk in the bar-room. Her husband and Whitlock then left the saloon but afterwards returned, and her husband said he would withdraw the bet, and demanded his watch, but to this Whitlock objected, and Sloan refused to surrender it without

86	177
100	572
86	177
108	849
86	177
114	382
86	177
d128	562

Whitlock's consent. Her husband and Whitlock had angry words about the matter, Whitlock by that time being under the influence of liquor purchased at Johnson's saloon. Whitlock agreed to let her husband have his watch if he would pay Whitlock's expenses of that day at the saloon, which proposition her husband declined. This was about eleven o'clock in the forenoon. In the afternoon he went to the saloon and demanded his watch again. Whitlock was then considerably under the influence of liquors purchased at Johnson's saloon, and that too while Whitlock was drunk and so known to be by Johnson. When her husband demanded his watch in the afternoon, Whitlock refused to allow him to have it, and they then quarrelled in the saloon in the presence of Johnson and his clerks, threatening to fight, and Belding made preparations to fight by pulling off his coat and hat, whereupon Whitlock, without cause, shot and killed him. Johnson was the owner and proprietor of the saloon, and invited her husband and all other persons there to drink, promising him and all others that he would maintain order and protect all persons from violence by any person in his bar-room, but he not only failed to do this but sold liquor to Whitlock when he was drunk, knowing that Whitlock when under the influence of liquor was a violent and dangerous man, and that Whitlock and her husband were angry with each other, and that Whitlock had threatened to whip her husband. Johnson and his servants continued to furnish liquors to Whitlock when they knew he was drunk, and instead of protecting her husband against Whitlock's violence, stood by and saw him shoot her husband down without cause, and without attempting to protect him and without uttering one word of remonstrance. The difficulty could have been averted and the life of her husband saved if Johnson had refrained from selling Whitlock

liquor, and discharged his duty in keeping order and protecting her husband from Whitlock's violence. At the time her husband was killed he was healthy and strong, thirty years old, able to earn by his labor \$100 per month, etc., and she has been deprived of his earnings and protection by the wrongful and illegal conduct of defendants.

On general demurrer the action was dismissed as to Johnson, and the plaintiff excepted.

T. P. WESTMORELAND and L. B. AUSTIN, Jr., by brief, for plaintiff.

ARNOLD & ARNOLD, for defendant.

SIMMONS, Justice.

Under the facts alleged in the declaration, which will be found set out in the official report, there was no error in sustaining the demurrer and dismissing the case. Under these facts, we do not think Johnson was liable to the widow of Belding on account of her husband's having been killed by Whitlock in Johnson's bar-room. The declaration alleges that Johnson sold liquor to these parties in the forenoon, and that the quarrel between the latter then originated, in regard to a wager they had made; yet the homicide did not occur until the afternoon, when Belding again entered the bar-room for the purpose of obtaining the watch he had wagered with Whitlock in the forenoon; he did not enter as a customer or guest, but upon his own private business. He then met Whitlock the last time, the quarrel was renewed and he was killed.

Our statute allows a recovery by certain named persons for a homicide when "the death of a human being results from a crime or from criminal or other negligence." Acts 1887, p. 45. It is sought to make Johnson liable in this action because he furnished liquor to Whitlock when drunk and failed to protect Belding against Whitlock, both being in his saloon at the time

of the homicide, and Johnson himself being present. Under the facts as alleged, we do not think this was such negligence or misconduct on the part of Johnson as would authorize the widow to recover against him, especially as Belding was not even a guest or customer of Johnson at the time. Our code, §§3072-3, declares: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer. Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act but not its legal or material consequence, are too remote and contingent." Under these sections of the code, we think the damages too remote to be recovered. "Other and contingent circumstances" preponderated largely in causing the homicide; and the damages, though traceable remotely to the act of selling the liquor, are not the "legal and material consequence" of the act. They do not arise directly from that act, but from the act of shooting, and indirectly from the bet made between Belding and Whitlock, Whitlock's refusal to give up the watch, and Belding's return in the afternoon to recover it and his preparation for a fight with Whitlock. These indirect elements are more proximate than is that of furnishing the liquor. There are many cases in the reports where recoveries have been had against bar-keepers for injuries arising from the sale of liquor to persons, but all of them, so far as we have ascertained, except the case of *Rommel v. Schambacher*, 120 Pa. St. Rep. 579, are founded wholly upon special statutes authorizing recovery for such injuries. In no other State has the right to recover been placed upon common law principles: and several of the courts, in discussing

the question, say that no recovery could be had at common law. As we have no special statute in this State authorizing such recovery, and as the two sections above cited from our code are declaratory of the common law of this State, and as we think that under these sections the damages claimed are too remote, we affirm the judgment of the court below sustaining the demurrer and dismissing the case. Even *Rommel v. Schambacher*, *supra*, would not be a precedent for recovery in a case of homicide, for at common law, homicide gave no cause of action. Besides, Pennsylvania had a statute upon which the decision in that case could have been predicated.

*Judgment affirmed.*

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TAYLOR v. KEMP *et al.*

1. A sale of land by one to whom it was devised with permission to him to use it without charge for waste so long as he should live, not subject, however, to his debts or contracts "nor to be rented even by him, and after his death then share and share alike to his children, and should any child or children of his be dead at the time of his death, their issue to take the share such dead child or children would have taken had they been alive, in fee simple," passed only an estate for his life; and the purchaser was not entitled, as against the remaindermen, to be paid for any permanent improvements he made upon the land, except as a set-off against mesne profits, although he was a *bona fide* purchaser and thought he was buying a fee simple title. Only legal and not equitable rights against him being invoked, his prayer for decree that the land be sold and the fund thereby realized be equitably distributed between the remaindermen and himself, could not be granted, although the improvements he made largely enhanced the value of the property.
2. None of the plaintiffs having attained majority more than seven years before bringing this suit, and the life-tenant having died in January, 1888, the defendant had no title by prescription.
3. An order passed in 1869 by the judge of the superior court for sale of the land and reinvestment of the proceeds, on the petition of the life-tenant in the character of trustee, stating that "this land was devised to him for life with remainder over in fee to the petitioner in trust for the children of the petitioner," was invalid as

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99	450
86	181
105	807
86	181
100	633
106	665
106	669
106	670
86	181
117	838
117	962
86	181
121	632
86	181
123	292

against the remaindermen for want of jurisdiction; the will showing no trust created in favor of the life-tenant or his children, and although the life-tenant was therein appointed one of the executors, his application not being in that capacity for leave to sell to pay debts or for distribution.

4. The rulings of the court on the pleas being correct, it was not error to direct a verdict in favor of the plaintiffs.

November 12, 1890.

Estates. Wills. Remainders. Title. Equity. Prescription. Sales. Jurisdiction. Trusts. *Bona fides*. Practice. Before Judge LUMPKIN. Screven superior court. November term, 1889.

Reported in the decision.

DELL & WADE and W. HOBBY, for plaintiff in error.  
T. H. POTTER, *contra*.

SIMMONS, Justice.

In 1859, Alexander Kemp made his will and appointed his wife and his son, W. W. Kemp, and another, executors. The testator devised to his son William certain land to be delivered to him when and as soon as he should become 21 years of age, and not before. The executors were directed to permit his son to use the land without charge for waste so long as he should live, not subject, however, to his debts or contracts, "nor to be rented even by him," but to use it as a home whenever he might think fit, "and after his death then share and share alike to his children, and should any child or children of his be dead at the time of his death, their issue to take the share such dead child or children would have taken had they been alive, in fee simple."

W. W. Kemp qualified as the sole executor of this will, and upon the death of his father, went into possession of the land. In 1869, Kemp applied as trustee to the judge of the superior court for leave to sell this land and to reinvest the proceeds in other land. Leave was granted by the judge; and he sold the land to Taylor, the defendant; but it does not appear whether

the money arising from the sale was reinvested. Kemp died in January, 1888, leaving the plaintiffs, his children. Shortly after his death, his children commenced suit against Taylor for the land. Upon the trial of the case, under the charge of the court, the jury returned a verdict in favor of the plaintiffs. The defendant made a motion for a new trial, which was overruled by the court. The 4th and 5th grounds of the motion complain that the court erred in striking the defendant's plea. The substance of the plea was, that Taylor was a *bona fide* purchaser without notice of any defect in the title; and that if the title of the plaintiffs be paramount, he should not be ejected until the plaintiffs had fully compensated him for the many permanent improvements he had put upon the land,—setting forth in detail the improvements he had made, and alleging that by reason of these improvements the land had become enhanced in value at least \$1,500; that the estate of W. W. Kemp was insolvent; and he prayed that he might have such equitable relief as the nature of the case required; and that if his prescriptive title was not good, the land be sold under the decree of the court and the funds realized distributed equitably between the plaintiffs and himself according to their respective right.

1. There was no error in striking this plea, under the facts of the case. As we will presently show, W. W. Kemp had only a life-estate in this property, and that is all that Taylor purchased. He may have been mistaken as to the title which he obtained from Kemp, and may have thought that he got a fee simple title, but under the will it is clear to our minds that Kemp had only a life-estate and could not sell more than that. Taylor, therefore, having purchased only the life-estate, was not entitled to be paid by these plaintiffs for any permanent improvements he had made upon the land,



except as a set-off against mesne profits; and the record shows that the plaintiffs abandoned their claim for mesne profits pending the trial, and the court thereupon dismissed these pleas. Taylor having no legal or equitable title to the land, and none but legal remedies being invoked against him, we know of no law in this State which would authorize him to recover of the plaintiffs for permanent improvements placed by him upon their land. *Fields v. Carlton*, 75 Ga. 554; *Same v. Same*, 84 Ga. 597, 11 S. E. Rep. 124.

2. The 6th and 7th grounds of the motion complain that the court ruled that the prescriptive title of the defendant did not commence to run against the plaintiffs until after the death of W. W. Kemp, the father, and unless seven years had elapsed since his death, it appearing that none of the plaintiffs had become twenty-one years old more than seven years before the bringing of the suit. We have already decided, in passing upon the preceding grounds, that W. W. Kemp had only a life-estate in this land. Under the will, he was to have only the use of it during his life, and after his death it was to go to his children or grandchildren as the case may be. Such was the rule in the case of *Pearce v. Goodrich*, 83 Ga. 781, and the authorities there cited; and this court has held in several cases, recently in the case of *Bagley v. Kennedy*, 81 Ga. 721, that the statute did not commence to run against the remaindermen until the death of the life-tenant. So we think the court was right in holding that Kemp, the father, had only a life-estate, and that the statute did not commence to run against his children until after his death.

3. The 8th ground complains that the court held that the sale from W. W. Kemp, executor, to the defendant, under the deed of November 10th, 1869, was invalid as against the remaindermen, although it was conceded that the defendant was a *bona fide* purchaser

without notice. We think the court was right also in this ruling. The application made by W. W. Kemp to the chancellor was made in the character of trustee, and he states in the application that "this land was devised to him for life with remainder over in fee to the petitioner in trust for the children of the petitioner." It was made, therefore, not as executor, but as trustee; and the will clearly shows that there was no trust created in favor of him or his children, but that it was simply a life-estate in him, with remainder in fee at his death to his children, and the prayer of the petition was for a sale of the land and a reinvestment in other land. Under the terms of the will and the facts set out in the petition, we do not think the chancellor had any jurisdiction to pass the order he did, authorizing Kemp to sell this land and reinvest the proceeds in other land. If, as executor, he had applied to the chancellor for leave to sell the land to pay debts of the estate, or to sell it for the purpose of distribution, then, as we held in the cases of *McGowan v. Lufburrow*, 82 Ga. 523, and *Blake v. Black*, 84 Ga. 392, the chancellor would have jurisdiction to pass the order. But the application not being for these purposes, and there being no trust created for the remaindermen, the chancellor had no jurisdiction to pass the order. *Rogers v. Pace*, 75 Ga. 436; *East Rome Town Co. v. Cothran*, 81 Ga. 359.

4. The defendant's pleas having been stricken, and the ruling of the court upon the other pleas having been correct, the court did not err in directing the jury to find a verdict for the plaintiff, as complained of in the 9th ground of the motion. *Judgment affirmed.*

## MOORE, MARSH &amp; Co. v. NEILL. WAXELBAUM v. NEILL.

1. These attachments were void under the ruling in *Meinhard v. Neill*.
2. Void attachments would derive no validity from any amendment of the petitions on which they were issued, void proceedings not being amendable.

November 21, 1890.

Attachments. Fraud. Debtor and creditor. Before Judge RONEY. Burke superior court. December term, 1889.

In these cases and those of Gray and Coleman, following, the petitions were for attachments under the code, §3297 *et seq.*, and upon them the judge issued attachments which were levied upon goods to which claims were interposed by Neill. The petitions of Gray and of Coleman were presented to the judge on December 11, 1888; that of Waxelbaum, on January 9, 1889; and that of Moore, on January 25, 1889. The affidavit of Blackwell, supporting the petitions of Gray and Coleman, is recited in the opinion of Justice BLANDFORD in those cases. Similar affidavits for him were written out and attached to the petitions of Waxelbaum and Moore, but were not signed; and to these two petitions were attached affidavits of the attorney at law for the petitioners, stating that the allegations contained in the petitions, so far as they came within his knowledge, were true, and so far as derived from the knowledge of others he believed them to be true; and the affidavits of Gray, stating that on November 15, 1888, and after the pretended sale by Blackwell to Neill, Neill told Gray that he (Gray) need not be uneasy, that he (Neill) and Blackwell "had an understanding that when he (Neill) got his money out of the business, he was to convey to such person as Blackwell should name, and if Blackwell or any friend could or would raise that money, he was to turn the property over to such one

as Blackwell desired, that he did not intend and it was not so understood that he was not to make a cent out of Blackwell, that he was the best friend Blackwell had in the world, etc." The claimant moved to dismiss the levies, because the allegations of the petitions were not positively sworn to, and because they were not supported by sufficient written evidence to have authorized the issuance of the attachments. Counsel for the plaintiffs in attachment moved to amend their petitions by attaching to them certified copies of a petition supported by positive affidavit of the claimant, on which the judge had issued an attachment against Blackwell on November 15, 1888, which attachment was levied on the stock of goods now claimed by Neill; and by also attaching to the petitions of Waxelbaum and Moore certified copies of the petitions of Gray and Coleman, with the affidavits thereto attached. The petition supported by the affidavit of the claimant, was of file in the clerk's office at the time of the issuance of the Gray and Coleman attachments; and the Gray and Coleman petitions with the attached affidavits were of file in that office at the time of the issuance of the Waxelbaum and Moore attachments. At the time the judge issued the attachments now in question, he recalled that he had issued the attachment on the petition supported by the claimant's affidavit, but this petition and affidavit were not before him nor formally tendered. When the Waxelbaum and Moore petitions were presented to him, he noted that the affidavit for Blackwell was unsigned, and the plaintiffs' counsel stated that Blackwell was absent, but that the unsigned affidavit was a substantial copy of those Blackwell had signed; and though the judge remembered the substantial portions of the affidavits which Blackwell had signed, they were not before him nor tendered when he issued the Waxelbaum and Moore attachments. The

motions to dismiss all the levies were sustained, and exceptions were taken in each case.

P. P. JOHNSTON and E. L. BRINSON, for plaintiffs.

LAWSON, CALLAWAY & SCALES and BOYKIN WRIGHT, for claimant.

BLECKLEY, Chief Justice.

1. The affidavits supporting the petition for attachment in each of these cases were substantially the same, in all essential particulars, as those which were ruled insufficient in *Meinhard v. Neill*, 85 Ga. 265, 11 S. E. Rep. 613. That case being directly in point, is a controlling, and to us a satisfactory authority in the present cases.

2. The only remaining question is, whether the court erred in denying the application made by the plaintiffs in attachment to amend their petitions for attachment, by appending to the same certified copies of certain documents connected with other attachment cases, but which had never been part or parcel of the papers appertaining to these two cases or either of them. This application was made long after the attachments were issued and levied, and not until a motion was pending to dismiss the levy, which motion involved the question whether the attachments on their face were void. Their validity or invalidity would have to be determined before the right to amend the petitions could properly be decided; for if they were void, there was nothing to amend. That they were void, is established by the case of *Meinhard v. Neill*, above cited. It follows that, in its effects, that case is controlling on the question of amendment also.

*Judgment affirmed.*

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GRAY v. NEILL. COLEMAN, BURDEN & Co. v. NEILL.

The grounds of petitions for attachments under code, §3297, being that the debtor had conveyed all his property to the agent of cer.

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107	242
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117	886
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118	262

tain of his creditors, with the understanding between them that, after these creditors had been paid, the agent was to reconvey the property to the debtor or any other person he might desire, and that this arrangement was made by the debtor for the purpose of avoiding the payment of his debts; and such petitions being verified by the affidavit of the debtor himself, deposing that the facts stated in the petitions were substantially correct, except that the conveyance was not made for the purpose of defrauding his creditors, but he hoped by thus hindering and delaying them to gain time, and intended eventually to pay his creditors in whole or in part, if he could do so: *Held*, that the attachments were lawfully issued.

November 21, 1890.

Attachments. Fraud. Debtor and creditor. Before Judge RONEY. Burke superior court. December term, 1889.

Reported in the decision.

P. P. JOHNSTON and E. L. BRINSON, for plaintiffs.

LAWSON, CALLAWAY & SCALES and BOYKIN WRIGHT, for claimant.

BLANDFORD, Justice.

These two cases rest upon precisely the same facts. Both were cases where attachments were sued out under section 3297 of the code and levied upon certain property as the property of Blackwell, which was claimed by Neill. Upon the trial of the cases, Neill moved to dismiss the attachments upon the ground that the allegations contained in the same were not sufficiently verified. The court sustained the motion and dismissed the attachments. This ruling of the court is excepted to, and is the error complained of.

In looking into the records in these cases, we find that the grounds of the attachments were that Blackwell, the debtor, had transferred and conveyed all of his property to Neill, the agent of another person or firm, with the understanding between them that after the firm which Neill represented had been paid, then Neill was to reconvey the property thus conveyed to him by

Blackwell either to Blackwell or to any other person Blackwell might desire, and that this arrangement was made by Blackwell for the purpose of avoiding the payment of his debts. We further find that these petitions were verified by Blackwell, the debtor himself, by an affidavit in which he says that the facts stated in the petitions are substantially correct, except that the conveyance to Neill was not made for the purpose of defrauding his creditors, but he hoped by thus hindering and delaying them to gain time, and intended eventually to pay his creditors in whole or in part if he could do so. We think this statement in the affidavit of Blackwell shows that the plaintiffs in error in these cases had the right to sue out these attachments under §3297 of the code. That section provides that whenever a debtor shall sell, or convey, or conceal his property liable for the payment of his debts, for the purpose of avoiding the payment of the same, and this is made to appear to the judge of the superior court, an attachment may issue. The learned judge, as it seems to us, granted the motion to dismiss the attachments sued out in these cases, upon the ground that Blackwell, the debtor, stated that the conveyance was not for the purpose of defrauding his creditors. But it will be seen, by looking at this section of the code, that whenever a debtor makes a conveyance, or sells his property for the purpose of avoiding the payment of his debts, then, in such a case, an attachment may issue. Whether this debtor intended to defraud his creditors or not, if the conveyance which he made to Neill was for the purpose of hindering and delaying his creditors (as he says it was), then we think it was for the purpose of avoiding the payment of his debts. Every man is required to pay his debts when they fall due, and if he does anything with his property to prevent his creditors from collecting their debts when they become due, by selling or conveying it so as to hinder or

delay them in the collection of the same, then we think such debtor falls within the provision of the section above mentioned. And we think that the affidavit of Blackweil, which appears in the records of these cases, fully sustains the allegations contained in the petitions of plaintiffs for the issuing of attachments. See case of *Brown v. Massman*, 71 Ga. 859. In the case of *Loeb v. Smith*, 78 Ga. 504, this section, and the following sections of the code on the subject, are fully discussed by this court in an opinion delivered by the Chief Justice. A proceeding under this section of the code is in its nature similar to a proceeding in equity *quia timet*; and it was there ruled, and has subsequently been held, that the ordinary proceeding under this section of the code would be for the party to petition for a writ of attachment, to present his proofs by affidavits to the judge, and that such judge, after having considered the proofs submitted to him and found them sufficient, should then adjudge and grant an order that the attachment issue. The attachment might be issued by the judge himself thereafter, as under the law of this State he has a right to issue an attachment; or by any other officer who, under the law of this State, is authorized to issue attachments in such cases. It might be issued by the clerk of the superior court under the direction of the judge, the papers containing the affidavits and proofs submitted to the judge upon such application being filed with the clerk of the court. The opposite party, if he thought proper so to do, might except to the issuing of such attachment, and by writ of error could have the same reviewed by this court; or he might controvert the grounds of the attachment by applying to the judge, stating fully and distinctly his grounds of defence, and showing why such attachment should not have been issued or should be removed, supporting the same by affidavit or such other



testimony as he can control; and the judge should then appoint a time and place for hearing both parties (plaintiff and defendant), provide for due notice to all persons interested, allowing them full opportunity to sustain their respective cases, as in application upon injunction, and upon a review of the law and the facts of the case, make such order in the premises as is consistent with justice, either totally or partially removing such attachment, or wholly or partially retaining the same, or disposing of the same in some manner which would be equitable and just to all parties. And it is further provided that the decision of the judge granting or refusing an attachment under the provisions of this article may be excepted to and carried to the Supreme Court, as was practiced in applications for injunctions prior to the 28th of October, 1870. See, also, the case of *Gazan v. Royce*, 78 Ga. 512; and see *Clay's case*, 79 Ga. 596. The present case differs from the case of *Meinhard v. Neill*, 85 Ga. 265. In that case, as it appeared to us, the petition for attachment was not sufficiently verified. There was no affidavit of Blackwell in that case, nor was there any affidavit or other proof submitted showing positively that the grounds of the attachment were true, which has been held in the cases above cited.

So we think that the court below committed error in dismissing the plaintiffs' attachments in these two cases, and the judgment of the court is therefore *Reversed*.

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#### ANDREWS v. THE CENTRAL RAILROAD AND BANKING CO.

Though a standing railway train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover unless the engineer, conductor or some other person having control of the train's movements, knew of his attempt to cross or had notice of his exposure to danger.

November 21, 1890.

Negligence. Railroads. Before Judge RONEY. Burke superior court. June term, 1890. .

The petition of Andrews alleged that the railroad company had damaged him \$3,000; that in October 1888, in the town of Midville, Burke county, in the usual course of business, he had occasion to go from a store on one side of the main street through which the track of defendant ran lengthwise, to a store on the opposite side of the street; that he proceeded in the customary and proper course, and in doing so, found that a very long freight-train of defendant had stopped in the street and had for a considerable time been standing in the street; that he proceeded until, coming to the point opposite the store to which he was going and at the intersection of another public crossing with the one already mentioned, he proceeded openly and in the presence of the employees of the train to pass between two of the freight-cars about the middle of the train, by climbing upon the projection or platform of the freight-car; that it was in the daytime, and he used all proper care and caution in passing between the cars; that the train had been standing there for a long while, and no indication was given of any intention to start, and it remained standing some time after the injury; that it was very long and directly across the public crossing, and while he, in the exercise of all due care and caution, was openly proceeding between the cars at the public crossing, the train was negligently, improperly and recklessly, without blowing the whistle, ringing the bell, warning of conductor, or other sign or signal, suddenly and violently bumped and knocked backward a few yards by the engine, forcing the cars together, and in the jolt and jar catching his right foot between the bumpers, violently mashing, bruising, straining, and dislocating it, inflicting great pain and suffering, etc.

Defendant demurred upon the grounds that the

declaration set out no cause of action; was deceptive and void for indefiniteness and uncertainty; showed upon its face that the alleged injury was caused by plaintiff's negligence; and showed that if there was any negligence on the part of defendant, plaintiff could have avoided the consequences thereof by the exercise of ordinary care. This demurrer was sustained, and the plaintiff excepted.

J. R. LAMAR, for plaintiff.

LAWTON & CUNNINGHAM and J. J. JONES & SON, for defendant.

BLECKLEY, Chief Justice.

No doubt the railroad company, on the facts alleged in the declaration (for which see the report), had no right to obstruct the public crossing with its train and delay the plaintiff unduly in his passage along the street from one side of the railway to the other; but the obstruction, and the nature of it, were open and visible, and there is no sufficient reason alleged why the plaintiff should not have anticipated that the train might move at any moment. Nevertheless, instead of waiting for the train to get out of the way, applying for it to be moved, or attempting to go round it, he voluntarily and without warning any one of his intention exposed himself between the cars by climbing upon their platforms adjacent to the bumpers, and was injured. There is nothing alleged from which it can rightly be inferred that his presence and position were known to the engineer or to any person controlling the movements of the train. It is alleged that he proceeded to pass between the cars "openly and in presence of the employees of said train," but it was a very long train, and where he attempted to cross was about the middle of it. Who were the employees present, or what was their relation to the train, is not

stated. It would be a mere guess to hold that the conductor was one of those present; and it would be an absurd guess to hold that the engineer was one of the number, his proper place being upon the locomotive at the end of the train, and the movement of the cars which caused the injury being so soon after the plaintiff exposed himself to danger that the engineer must have been at his post when that exposure became visible, even to an immediate bystander. If the engineer, conductor or any other person whose duty it might have been to keep the train still while the plaintiff was passing between the cars, knew that he was so passing, or had notice of his exposure to danger, it was easy to allege it. Why should such a material fact—the only fact which would give the plaintiff a right to any diligence in his favor when in such a hazardous position—be left to conjecture or supposition instead of being plainly and distinctly set forth as a part of the cause of action? Code, §3332. In the absence of such an averment, the plaintiff's hurt, by having his foot caught between the bumpers and crushed, must be attributed to his own rashness. It was not error to sustain the demurrer to the declaration. Upon his own showing, the plaintiff was without any legal right to recover.

*Judgment affirmed.*

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SMITH v. THE SAVANNAH, FLA. & WESTERN RAILWAY CO.

<sup>88</sup> 185  
<sup>115</sup> 584

Error is not assignable on the reasons of the judge for granting a new trial. This case is within the general rule subjecting a first new trial to the discretion of the trial court, there being no abuse of that discretion.

November 21, 1890.

New trial. Practice. Before Judge HARDEN. City court of Savannah. February term, 1890.

GARRARD & MELDRIM, for plaintiff.

CHISHOLM, ERWIN & DUBIGNON, for defendant.

BLECKLEY, Chief Justice.

This is the first grant of a new trial. The motion contains several grounds, some of them special and some general. The judgment granting a new trial rests upon the whole motion, not being put by the order upon any particular ground. The opinion of the court discusses the reasons of the presiding judge for deciding as he did. But these reasons, whether illogical or not, are no part of the judgment, and consequently are not open to attack by assigning them as error. The only reviewable action of the court in deciding the motion is the judgment which the court rendered. *Central R. R. v. Smith*, 74 Ga. 112. It is manifest that the mind of the judge was dissatisfied with the verdict upon the merits of the case, the real substance of the controversy. He declared that it seemed strongly his duty to grant a new trial. This being so, and his court being still in possession and control of all points involved in the case, including the reasons of the judge for granting the motion, which reasons he can reconsider if the plaintiff below should obtain another verdict on the same evidence, we see nothing to take this case out of the general rule that the first grant of a new trial will not be interfered with. If errors were committed on the former trial, the presumption is that they will be corrected, not repeated, on the next. And if no errors were committed then, the trial judge certainly needs no aid from us for his guidance in conducting the new trial. We think there has been no abuse of discretion.

*Judgment affirmed.*

## CULVER v. THE STATE.

96	197
114	16

If by false statements that he was the owner of a certain plantation of a given value, upon which he lived, the accused induced the sale to himself of goods for which he failed to pay, he could not relieve himself of the charge of cheating and swindling by showing that he really owned certain other property of much less value.

November 21, 1890.

Cheating and swindling. Criminal law. Evidence. Before Judge EVE. City court of Richmond county. November adjourned term, 1889.

Reported in the decision.

J. T. JORDAN, by HARRISON & PEEPLES, for plaintiff in error.

C. H. COHEN, solicitor, and M. P. FOSTER, *contra*.

BLANDFORD, Justice.

Culver was indicted under section 4587 of the code of this State, and convicted of cheating and swindling. It appears from the evidence for the State that he represented that he was the owner of a certain plantation, of a given value, upon which he lived, by which representations the prosecutor sold to him certain goods mentioned in the indictment. He also represented the value of the plantation and what he himself was worth over and above his debts. The State showed by evidence which is undeniable that he did not own the plantation upon which he lived, but that he rented the same, and that the same belonged to another person. Culver, the defendant, then offered to prove by the witness who so testified that he (Culver) owned another place of the value of \$800, or some such sum, and merchandize worth \$1,000. This testimony was objected to; the court sustained the objection, and this is the only error relied upon before this court by counsel for the plaintiff in error.

We think the court below committed no error in refusing to allow this testimony. If the statements made by Culver to the prosecutor were false, and by reason of such false statements the prosecutor was induced to sell him the goods, for which he failed to pay, then we think he could not relieve himself by showing that he owned other property and of much less value than the property which he represented to the prosecutor was owned by him. If he, by false representations, defrauded the prosecutor of any goods, which the prosecutor was induced to sell him by reason of the false representations which were testified to in this case, we do not think it was admissible for him to attempt to relieve himself by showing that he had other property of much less value than that which he represented to the prosecutor he was the owner of. So we think the judgment of the court rejecting this evidence was right.

We say nothing, and make no intimation, as to whether the indictment in this case was sufficient or not, as no such question was made before us.

The judgment of the court below is *Affirmed.*

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DUTCHER v. HOBBY, trustee, for use.

86 198  
1109 658

Where property sold under a void foreclosure of a mortgage as the property of a mortgagor, has been purchased at sheriff's sale, and the purchase money applied to the payment of the mortgage, and the sale and purchase are afterwards set aside and declared void, the purchaser can be subrogated to the rights which the mortgagee originally had to have his mortgage foreclosed and the property therein conveyed sold in discharge of the lien of the mortgage.

November 21, 1890.

Sales. Mortgages. Subrogation. Equity. Before Judge RONEY. Columbia superior court. March term, 1890.

For previous parts of this litigation see 77 Ga. 504,

80 Ga. 124, and 83 Ga. 1. The present case was made by a petition filed by Hobby as trustee, suing for the use of Warren, administrator of Caswell, against several Bunches and one Dutcher, the following facts appearing: Petitioner conveyed certain land to Mrs. Bunch and her children. For part of the purchase money she gave her notes for \$300, secured by her mortgage on the land. Default was made in the payment of the notes; petition for foreclosure of the mortgage was filed; rule *nisi* was granted and served by leaving it at the residence of the defendants; rule absolute was granted, from which execution issued and was levied on the land, which was sold and bid off for \$324 25 by Caswell, to whom a sheriff's deed was executed, and the net proceeds of the sale were paid to the mortgagee. Upon proceeding to take possession, Caswell was resisted by a bill in equity by the Bunches, on the ground that the foreclosure was illegal, the service being void. The bill admitted the debt, and offered to refund Caswell's bid. It was afterwards dismissed. Then ejectment was brought to recover the land for Caswell's estate (see 83 Ga. 1). In the meantime Dutcher had acquired rights as attorney for the Bunches, and he proceeded to foreclose his lien. The land was levied on for one year's taxes (about \$7), and was sold by the sheriff and bid off for \$15 by one Banks, who received a sheriff's deed and transferred it to one of the Bunches, who is in possession and claims title in fee, free from the mortgage lien. The tax levy was upon the entire land, 140 acres, worth \$1,000 and easily divisible, and this levy and the transfer to Bunch were fraudulent and void and for the purpose of defeating the rights of the parties under the mortgage and in the ejectment suit then pending, to which he was a party defendant. Petitioner tenders continuously to him the amount of the bid with ten per cent. interest from



the time of the tax sale. The prayers are, for decree foreclosing the mortgage for the principal and interest of the unpaid purchase money, the same to be paid to Warren, administrator, and declaring the sheriff's deed to Bunch to be void, and that Dutcher's claim rest on what remains after payment of the purchase money for the land; and that he be restrained from enforcing any judgment upon his lien until the priorities are settled by final decree, etc.

Dutcher demurred on the ground that the matters set forth are not sufficient in equity to entitle the petitioner to the relief sought; and to the overruling of this demurrer he excepted.

SALEM DUTCHER, by brief, for plaintiff in error.

FRANK H. MILLER, by brief, *contra*.

BLANDFORD, Justice.

The main question in this case is whether, where property sold under a void foreclosure of a mortgage as the property of the mortgagor which has been purchased by one at sheriff's sale and the purchase money applied to the payment of the mortgage, and said sale and purchase is afterwards set aside and declared void, such purchaser can be subrogated to the rights which the mortgagee originally had to have his mortgage foreclosed and the property therein conveyed sold in discharge of the lien of the mortgage. It will not be necessary to consider any other question made by this record. While we are not permitted to lift the veil of the future, we take the liberty of pushing back the shutters of the past so as to let the light shine upon this question.

We think the authorities sufficiently answer this question in the affirmative. In 2d Freeman on Executions (2d ed.), §352, it is laid down that a purchaser at a void judicial sale, under foreclosure, has the same

right as the original mortgagee himself. In *Brobst v. Brock*, 10 Wall. 534, the court says: "It is enough that an irregular or a void judicial sale, made at the instance of a mortgagee, passes to the purchaser all the rights the mortgagee, as such, had." In *Gilbert v. Cooley*, Walker's Chancery, 494, it was held that though a statutory foreclosure of a mortgage be irregular and no bar to the equity of redemption, yet a purchaser at such sale succeeds to all the interest of the mortgagee. To the same effect see the case of *Jackson v. Bowen*, 7 Cowen, 13, wherein the court held that a conveyance by a mortgagee, as upon a statutory foreclosure under the power of sale in his mortgage, even if the proceedings to foreclose be irregular, yet carries all his interest as mortgagee to the purchaser, as well in the debt as the land mortgaged. Such a deed operates as a good assignment and the purchaser may claim as assignee. See, also, Rorer on Jud. Sales, §224; 1 Jones on Mort. 874, subdiv. (a), §878; Freeman on Void Jud. Sales, 51, 52, 53; Davis v. Gaines, 104 U. S. 386; Bentley v. Long, 1 Strob. (S. C.) 43; Howard v. North, 5 Tex. 290; Robertson v. Bradford, 73 Ala. 116; McGee v. Wallis, 57 Miss. 638, s. c. 34 Am. Rep. 364. In 1 Story's Eq. Jur. 478, it is said: "Such principle has the highest and most persuasive equity as well as common sense and common justice for its foundation." The cases cited by the learned counsel for the plaintiff in error will be found, upon examination, to apply to the doctrine of *caveat emptor*, which applies to sales upon valid judgments, and is usually invoked with reference to sales upon executions issued against the general property of the judgment debtor. See *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Smith v. Painter*, 5 Serg. & R. 223, 9 Am. Dec. 344. And such we find to be the cases in the *Georgia Reports* cited in the brief for the plaintiff in error.

So we are satisfied that the court committed no error in overruling the demurrer filed by the plaintiff in error in this case to the petition of the defendants in error; and the judgment is *Affirmed.*

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THE CENTRAL RAILROAD AND BANKING CO. v. WHITE.

Essential facts being in question, appeal to a jury in the justice's court, not *certiorari*, is the remedy to correct an erroneous judgment of the justice for fifty dollars or less.

November 21, 1890.

Appeal. *Certiorari*. Justices' courts. Before Judge FALLIGANT. Chatham superior court. March term, 1890.

White sued for \$50 damages from killing his cow. Evidence was introduced by both sides, upon which the justice rendered judgment for the plaintiff for \$50 and costs. Without appealing to a jury in the justice's court, the defendant carried the case to the superior court by *certiorari*, alleging that the justice erred in finding in favor of the plaintiff. In the superior court the *certiorari* was dismissed, on the ground that it was not the proper remedy before appeal to a jury in the justice's court. The defendant excepted.

E. S. ELLIOTT, for plaintiff in error.

CHARLTON & MACKALL, by S. B. ADAMS, *contra*.

SIMMONS, Justice.

The trial judge did not err in dismissing the writ of *certiorari*. *Certiorari* will not lie where the judgment of a justice of the peace is for \$50 or under, unless based exclusively upon a question of law. Where facts alone are involved, or both law and fact, appeal to a jury in the justice's court is the proper remedy. In this case essential facts were in question, and appeal was the proper remedy, and not *certiorari*. *Judgment affirmed.*

## RICHMOND &amp; DANVILLE RAILROAD CO. v. BENSON &amp; CO.

86	203
88	813
86	203
d115	963
86	203
118	384

1. Where the declaration prayed for process requiring the defendant to appear at the August term of the court, that being the next regular term, but by clerical mistake the process attached by the clerk and dated July 16th commanded the defendant to appear at the next term to be held on the first Monday in July, and the defendant by counsel appeared at the August term and moved to dismiss the case because the process was void, the court, having jurisdiction of the case, could allow the process to be amended.
2. Where goods were directed to be carried from Richmond, Va., to Augusta, Ga., but instead of being carried directly they were sent to Atlanta, Ga., thence to Charlotte, N. C., and thence to Augusta, and where they should have been received in Augusta on the first of September but were not received until the 8th, and on the 10th they were destroyed by a flood, and where from the 1st to the 10th the consignees sent daily to the depot of the carrier, exhibited the bill of lading and asked for and described the goods, but were informed that they had not arrived, though in fact they were then in the possession of the carrier, the agent of which afterwards admitted that they had arrived two days before the flood, and that by carelessness at headquarters the way-bill was not sent with them and was not received until after they were ~~destroyed~~, the carrier was liable for their value.
3. ~~(a) That the contract of carriage~~ exempted the carrier from liability for wrong carriage or wrong delivery of goods marked with initials or numbers or imperfectly marked, and that the goods in question were marked not with the name of the consignees but simply with a number in lieu thereof, does not excuse the carrier from liability; it appearing that the name of the consignees, as well as the number, was on the bill of lading, and that the carrier refused to deliver the goods to them and did not deliver them to any one.
3. There was no error in admitting in evidence the bill of lading over the objection that there was no proof of its execution, or of the signature thereto, or of the agency of the person purporting to have signed it.
4. There being no evidence that the carrier acted in bad faith or was stubbornly litigious or put the plaintiffs to unnecessary expense, an instruction that the jury could add reasonable attorneys' fees to the actual damages, was erroneous.

November 21, 1890.

Practice. Process. Amendment. Railroads. Carriers. Evidence. Damages. Attorneys' fees. Before Judge EVE. City court of Richmond county. August term, 1890.

Reported in the decision.

POPE BARROW, for plaintiff in error.

J. S. & W. T. DAVIDSON, *contra*.

SIMMONS, Justice.

Benson & Co. sued the railroad company for damages occasioned by the loss of certain goods described in the declaration. The process attached to the declaration commanded the defendant "to be and appear at the city court of Richmond county next to be holden in and for the county aforesaid, on the first Monday in July, 1889"; and was dated July 16th, 1889, and signed by the clerk of the city court. The regular term of the court was the first Monday in August. The defendant, by its counsel, appeared at the regular term and moved to dismiss the case because the process was void. On motion of plaintiff's counsel, the court allowed the process to be amended; and to this ruling the defendant excepted *pendente lite* and assigned error thereon. The trial was had, and the jury returned a verdict for the plaintiff. The defendant moved for a new trial on the grounds set out in the motion, which was refused, and it excepted.

1. We do not think the court erred in allowing the process to be amended. We do not agree with counsel for the plaintiff in error that the process was void, and therefore not amendable under section 3490 of the code. The declaration prayed for process requiring the defendant "to be and appear at the August term" of the court; and the process was issued in the name of the judge of that court, and signed by the clerk thereof, but by a clerical mistake the defendant was cited to appear the first Monday in July, instead of the first Monday in August. The court had jurisdiction of the case, and it seems from the record that the process was sufficient to bring the defendant to the regular

term of the court, at which time it made this motion to dismiss. Among the powers conferred upon every court by the code, §206(6), is the power "to amend and control its process and orders, so as to make them conformable to law and justice." In the case of *Townsend v. Stoddard*, 26 Ga. 430, where the process required the defendant to appear on the second Monday in April, and the time fixed by law for holding the court was the fourth Monday in April, this court held the process amendable. In *Covington v. Cothrans*, 35 Ga. 156, it was held that an attachment issued on the 3d of April, 1866, returnable to the "inferior" court, was amendable by inserting the word "county" instead of "inferior." WALKER, J., in delivering the opinion of the court, said: "The defendant was not ignorant of the court to which, the process was returned, for he appeared at the proper term and objected to the proceedings, because a single word 'inferior' had been used by the mistake of a ministerial officer for the word 'county.' The time for such trifling is past." In the case of *Blake v. Camp*, 45 Ga. 298, an attachment was sued out, returnable by law to the 1120th district G. M., but the magistrate, by mistake, made the attachment returnable to the 919th district. The levying officer returned the papers to the proper district, to wit, the 1120th, and judgment was then entered upon the attachment. It was held that the judgment was not void, and McCAY, J., said: "We do not think this mistake makes the proceedings void. It is not the written direction to the sheriff or constable which gives the court jurisdiction, but the law. If the officer had obeyed the direction and returned the papers as directed, the court to which it would then have been returned would not have had jurisdiction, and the judgment would have been void. As it is, the court which tried the case was authorized to do so by the statute. Our statute of amendments is very broad.

No technical objections even to a process are to be regarded, if the court has jurisdiction." In the case of *Williams v. Buchanan*, 75 Ga. 789, the original process required the defendant to appear "on the second Monday in April next," but by mistake the copy process required him to appear "on the second Monday in December next." The process was dated December 28th. The following April was the time of the regular term, and no term of the court was to meet in December. It was held that service of this declaration and copy process was sufficient to put the defendant on notice of the case. JACKSON, C. J., in the course of the opinion, said: "When a man knows that he is sued, and is served with a copy of the declaration which tells him what he is sued for and in what court, it would be well for him to step to the clerk of that court and find out something about any little mistake in the process, and attend at the first term to take advantage of the mistake, if it would avail him, or have it corrected and put off a term, if the court so decided; especially would it be prudent not to delay action until after trial term, verdict, judgment and execution, and then set up the mistake of the clerk, which must have been known to him the moment he read the copy declaration and process handed him by the sheriff, and called to mind the fact, known to everybody in Sumter county, that the superior court met in April and not in December." The code, §3345, declares: "No technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded: provided, there is a legal cause of action set forth as required by this code."

The ruling in *Lowrey v. Richmond & Danville R. Co.*, 83 Ga. 504, does not conflict with the ruling in this

case. As will be seen from a casual reading of that case, its facts were different from the facts in the present case. In that case the petition was addressed to the city court of Atlanta and process was prayed returnable to that court, but the clerk of the superior court of Fulton county, who was also *ex officio* clerk of the city court, annexed to the declaration and to the copy which was served on the defendant, a process requiring it to appear at an impossible term of the superior court, which process bore test in the name of the judge of the superior court and was signed by the clerk of the superior court. The process was held to be void for the reason that the suit was filed in the city court but the process required the defendant to appear in the superior court, and bore test in the name of the judge of the superior court and was signed by the clerk of the superior court as such, and not as clerk of the city court of Atlanta.

2. The main question argued before us in this case was as to the liability of the railroad company under the facts disclosed in the record. Counsel for the plaintiff in error insisted that the railroad company was not liable, because the goods were destroyed by an unprecedented flood, and under the law a common carrier is not liable for damage occasioned by the act of God. Counsel for the defendant in error replied that while it was true that the goods were destroyed by the flood, the facts show that if it had not been for the negligence of the defendant in delaying the goods an unreasonable time upon its road and detaining them in its depot after arrival at their destination, the flood would not have operated so as to injure or destroy them. Whether the law be that a common carrier is not liable when the damage is caused by the act of God though the negligence of the carrier contributed to the damage, or whether it be that the carrier is liable when the carrier's



negligence concurs with the act of God in causing the damage, is a question upon which we find the authorities very conflicting; but it is unnecessary for us to decide that question here. The facts show that the goods were directed to be shipped from Richmond, Va., to Augusta, Ga.; but instead of shipping them directly to Augusta, the carrier shipped them first to Atlanta, Ga., and reshipped them from Atlanta to Charlotte, N. C., and from Charlotte, N. C., shipped them to Augusta. They should have been received in Augusta on the 1st day of September; but they were not received until the 8th. On the 10th they were damaged by flood. The evidence shows that from the 1st of September up to the time of the flood, the consignees sent every day to the depot of the railroad company and asked for the goods, and were informed that they had not arrived. Miller, the clerk of the consignees who went to the agent of the railroad company and asked for the goods, testified: "I am quite sure I took the bill of lading with me and showed it. It was plainly marked on that that the box was for Benson & Co. We kept sending for the goods up to the day of the flood." It also appears that while the box was not marked with the name of Benson & Co., the consignees, but was marked simply with the figure 3005 in lieu of the name, their name did appear on the "way-bill" sent by the company to its agent in Augusta; and that the agent admitted, after the flood, that the loss was occasioned by carelessness at headquarters in not sending the way-bill with the goods; that the goods had arrived two days before the flood, and the way-bill was not received by him until after the goods were destroyed. Under these facts, we think that when Benson & Co. sent their clerk to the agent at Augusta and demanded the goods, and the clerk showed the agent the bill of lading with the entries thereon, and told him that the goods were a box of cheroot cigars (as he said in his

evidence he told him), and the goods were then in the possession of the railroad company, as the evidence shows they were, and the agent failed or refused to deliver them, it was a conversion of the goods on the part of the railroad company, and if the goods were subsequently destroyed by the flood, the railroad company was liable for the value thereof. If the goods had arrived at their destination and were in the possession of the railroad company, and Benson & Co. had carried their bill of lading and demanded possession thereof and the company had refused to deliver them, Benson & Co. could have commenced their action of trover at once against the railroad company and recovered the value of the goods, although they were subsequently destroyed by the flood.

But it is claimed by the railroad company that it could not deliver the goods to Benson & Co. because its contract of carriage with the shipper exempted it from liability from "wrong carriage or wrong delivery of goods that are marked with initials, numbers or imperfectly marked"; and that as these goods were simply marked 3005, the railroad company was not liable because it did not deliver them. We think that if the railroad company had delivered them to somebody else who had a bill of lading for a package of goods marked 3005, it perhaps would not have been liable; but as it did not deliver them to any one, and refused to deliver them to Benson & Co. when demanded upon their bill of lading, we do not think this clause in the contract applies.

3. It is complained that the court erred in admitting in evidence the bill of lading, because there was no proof of its execution, or of the signature thereto, or of the agency of the person purporting to have signed it. Under the evidence, we think there was no error in admitting the bill of lading, as it was sufficiently proved.

4. The plaintiff in error also complains that the court erred in charging the jury: "If you believe from the evidence that the defendant has acted in bad faith or has been stubbornly litigious, or that it has put the plaintiffs to unnecessary expense in this matter, then you can add to the actual damages reasonable attorney's fees"; and that under this charge the jury returned a verdict for \$30 attorney's fees, and that this verdict was contrary to the evidence. We think this exception is well-taken. There is no evidence in the record that the defendant acted in bad faith or was stubbornly litigious or put the plaintiffs to unnecessary expense. All that the defendant in the court below seems to have done was to appear in court and insist on what it claimed was its legal rights. The judgment must therefore be reversed and a new trial had, unless the plaintiff shall voluntarily write off from the verdict the sum of \$30; but in the event the plaintiff shall consent to do so, the judgment of the court below shall stand affirmed. *Judgment reversed, with direction.*

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THE NASHVILLE, CHATTANOOGA AND SAINT LOUIS RAILWAY COMPANY v. HEGGIE BROTHERS.

1. Under section 4386 of the Revised Statutes of the United States, for a railroad company to keep live-stock upon its cars for more than twenty-eight consecutive hours without unloading the same for rest, water and food, is negligence *per se*; and such company is liable, not only for the penalty prescribed in the statute, but also for any damage or injury that may thereby be sustained by the owner of the stock.
2. That the company's stock-yards at its feeding station were on fire when the train arrived there, was no sufficient excuse for not furnishing to the person in charge of the horses, in compliance with the contract of shipment, all proper facilities for taking care of them, nor for not stopping the car containing them there or at some other station, in compliance with the statute, so that they might be unloaded, watered and fed.]

3. Nor is the company excused from liability by the fact that the person in charge of the stock was deficient in urging compliance with the statute, for the company's servants should have known of such want of diligence on his part, and it was their duty to select the place for stopping with or without his request.

November 21, 1890.

Carriers. Negligence. Railroads. Contracts. Live-stock. Before Judge EVE. City court of Richmond county. November term, 1889.

Reported in the decision.

J. B. CUMMING and BRYAN CUMMING, for plaintiff in error.

FLEMING & ALEXANDER, *contra*.

SIMMONS, Justice.

This was an action brought by the defendants in error against the plaintiff in error for damages caused to a certain car-load of horses by reason of the negligence of the plaintiff in error in not stopping its cars so as to give the defendants in error an opportunity to water and feed their horses. A verdict was had for the defendants in error, and the railway company moved for a new trial, which was denied by the court, and it excepted to this ruling, alleging as error the special grounds set forth in its motion.

The evidence showed that the horses were shipped from St. Louis to Augusta, and had been on board of the train about twenty-six hours when the train arrived at Nashville; that the person in charge of the horses made inquiries of certain persons about the train as to getting the horses off and having them fed and watered, and was told that this could not be done; the stock-yards of the company were on fire when the train reached Nashville; no opportunity was afforded to the agent of the defendants in error to unload the horses for the purpose of feeding and watering them, by the railroad company or any of the employees thereof, but

the car in which the horses were loaded was attached to another train which proceeded through to Chattanooga, without giving an opportunity at any intermediate station for the horses to be taken care of. The special contract under which the horses were shipped was put in evidence, to the following effect: that the tariff rate on the shipment to Augusta was \$226.00 per car; that in consideration of the fact that the car was to be transported for \$113.00 and a free passage to the owner or his agent, on the train with the animals, this being a special rate lower than the regular rate, the shipper released the railroad company and its connecting lines from the liability of a common carrier in the transportation of the animals, and agreed that such liability should be only that of a private carrier for hire; that the shipper agreed that he would load and unload the animals at his own risk, and feed, water and attend the same at his own expense and risk while they were in the stock-yards awaiting shipment, and while on the cars or at feeding or transfer points, or where they might be unloaded for any purpose; that while the employees of the railroad should provide the owner or person in charge of the animals all proper facilities on trains and at stations for taking care of the same, the business of the railroad should not be delayed by the detention of the trains to unload and reload the animals for any cause whatever, but the car might be left at a station, upon the request of the person in charge of the same, and unloaded and reloaded by him; that should damage occur for which the railroad might be liable, the value at the date and place of shipment should govern the settlement, in which the amount claimed should not exceed, for a horse or mule, \$100.00, which amount it was agreed was as much as such animals were reasonably worth. This agreement was dated February 14th, 1889. It was shown by the

evidence that neither the railroad company nor any of its employees provided the person in charge of the animals with any facilities whatever for taking care of the same, notwithstanding it appears that the person in charge, in behalf of the owners of the horses, applied to various persons who seemed to be connected with the railroad, for permission and opportunity to unload the cars at Nashville in order that he might feed and water the animals and give them the required rest after their long journey. Nor were the cars left at Nashville, which was a feeding station, but they were attached to another train which proceeded through to Chattanooga. It is very clearly shown by the testimony that the damage to the stock was caused in consequence of the fact that they were kept on board of the cars for over forty hours, without rest or food or water. Therefore, we think the verdict of the jury was warranted by the testimony in the case.

Section 4386 of the Revised Statutes of the United States provides that "No railroad company within the United States, whose road forms any part of the line of road over which cattle, sheep, swine, or other animals, are conveyed from one State to another, or the owners or masters of steam, sailing or other vessels carrying or transporting cattle, sheep, swine, or other animals, from one State to another, shall confine the same in cars, boats or vessels of any description, for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes." We think, under this statute, that where a railroad company keeps live-stock upon its cars for more than twenty-eight consecutive hours, this constitutes negligence *per se*, and such railroad company is liable, not only for the penalty prescribed in

the statute, but also for any damages or injury that may thereby be sustained by the owner of the stock. We furthermore think that, under the contract between these parties, it was the duty of the railroad company to have afforded the person in charge and having care of these animals an opportunity to unload the same upon their arrival at Nashville, or at some other place, when they had been upon the cars twenty-eight consecutive hours; and having failed to afford this opportunity of feeding and watering the stock and giving them the required rest, the railroad company is liable for the consequences of any injury to the animals that may have ensued thereby. And while the statute of the United States was an act in favor of humane treatment of animals while being transported, yet we think that a violation of the same on the part of the railroad company was negligence in itself for which they would be liable. So we think the verdict of the jury was not without evidence to support it; nor do we think it was contrary to law. The fact that the stock-yards of the defendant were on fire when the train arrived at Nashville was not sufficient excuse for not furnishing to the person in charge of the animals, under the contract, all proper facilities for taking care of the same; nor was it a sufficient excuse for not stopping the car five hours, there or at some other station, as provided for in the statute, so that the animals, after they had been upon the cars twenty-eight consecutive hours, might be unloaded and watered and fed by the person in charge.

Should it be thought that the agent of the owner in attendance upon the stock was deficient in urging compliance with the statute, the railroad employees knew or should have known of that want of diligence on his part; and as it was for them to select the place for stopping and to comply with the statute, with or without his request, his failure in diligence is no excuse for

the company under the act of Congress. The owner of the stock not being present, his servant and the company's servants had no right as against him to violate the statute any more than as against the United States.

*Judgment affirmed.*

### McELMURRAY v. TURNER.

1. On trial in the superior court of a case appealed from the county court, it was not error to refuse to allow the defendant to show by the plaintiff, after she testified that her brother was wagoner for defendant and had hauled all of plaintiff's cotton, that she had introduced this brother as a witness in the county court and that he there in her presence testified to a certain number of bales of cotton as all of her crop, it not appearing that he was dead or inaccessible at the subsequent trial. Her acquiescence or silence at the giving of his testimony in the county court did not amount to an admission of its truth in open court, the circumstances not requiring an answer or denial, and it appearing that she did not herself know how many bales of cotton he hauled.
2. Where under the contract between landlord and cropper, the landlord furnished the land, stock, etc., and the cropper the labor, for making the crop of a year, which crop was to be controlled by the landlord until after the rent and advances were paid and then to be equally divided between them, the cropper was entitled, after the payment of the rent and advances, to foreclose her special laborer's lien for the balance due her.
3. Part of the labor furnished by her being that of her two minor children (she being a widow), she was entitled to the lien for that part as well as for the labor she did in person. And that in carrying out her contract she was compelled to employ extra labor for a few days, would not prevent the enforcement of her lien, it appearing that the landlord advanced her the money to pay for this extra labor, and the presumption being that he was credited with this money in the verdict.

November 21, 1890.

Contracts. Croppers. Liens. Evidence. Admissions. Parent and child. Before Judge RONEY. Burke superior court. June term, 1890.

Reported in the decision.

P. P. JOHNSTON, for plaintiff in error.

LOVETT & DAVIS and LAWSON & CALLAWAY, *contra*.

86	215
93	550
86	215
98	677
86	215
119	884
86	215
120	317
86	215
124	20
86	215
125	220



SIMMONS, Justice.

It appears from the evidence in this case that McElmurray and Rena Turner, in the year 1889, made a contract whereby McElmurray was to furnish land, stock, etc. to Rena Turner, and she was to furnish labor and make a crop on the land, and the crop was to be equally divided between them. The crop was made, and in October or November of that year, McElmurray discharged Rena Turner; whereupon she sued out a laborer's lien against him, claiming a special lien upon the crop raised by her as a laborer. McElmurray filed a counter-affidavit against the foreclosure of the lien, upon several grounds, and the case was returned to the court to be tried. On the trial thereof in the superior court (the case having been appealed from the county court), the jury returned a verdict in favor of the plaintiff; and the defendant made a motion for a new trial, which was overruled, and he excepted.

1. The 4th and 5th grounds of the motion are, in substance, that the court erred in refusing to allow counsel for the defendant to prove by the plaintiff, after she had testified that her brother Henry Turner was wagoner for McElmurray and had hauled all her cotton to the railroad station, that upon the trial of the case in the county court she had introduced her said brother as a witness in her behalf, and that he there testified that the amount of cotton made in her crop was only ten bales, except some scattered cotton, she having been present at the giving of this testimony and assenting thereto. We think the court was right in refusing to allow the testimony: (1) Because it does not appear that Henry Turner, the witness who testified in the county court, was dead or inaccessible; and if he was living and accessible, he ought to have been produced and sworn as a witness and compelled to give his own testimony. It was argued, however, that as

the plaintiff had introduced Henry Turner as a witness in her behalf on the trial in the county court, and heard him testify and assented to his testimony, this was in the nature of an admission in open court. (2) We do not think this was such an admission on the part of the plaintiff as would have authorized the reception of the testimony. Our code, §3790, declares that acquiescence or silence, when the circumstances require an answer or denial, or other conduct, may amount to an admission. But where a plaintiff or defendant introduces a witness in court, we do not think that the acquiescence or silence of the party during the progress of the trial would amount to an admission, the circumstances at that time not requiring an answer or denial. (3) As appears from the record, Rena Turner did not know of her own knowledge how many bales of cotton her brother had hauled to the railroad station. If she had known, it would not have been necessary to put her brother upon the stand to prove it. And as she did not know it of her own knowledge, she could not be held bound on another trial by the testimony of a witness introduced on the former trial. Nor would she have been bound absolutely by his testimony on the trial at which she introduced him, as she would have been allowed to prove by other witnesses a different state of facts from that testified to by this witness. *Cronan v. Roberts*, 65 Ga. 678.

2. The 6th ground complains that the verdict is contrary to law in this: "It appears from the undisputed evidence in the case, the testimony of both plaintiff and defendant, that the suit grows out of a contract under which plaintiff made a crop for the defendant on shares, defendant furnishing the land and stock and plaintiff the labor, and sharing equally in the proceeds of the farm; and that said crop was made by the labor of the plaintiff and her children, two of which children

were regular hands in the crop, and by such additional outside labor as was from time to time necessary. Under this state of facts, the share or interest of the plaintiff in said crop could not be recovered by the foreclosure of a laborer's lien, as under the law such lien or remedy can only be invoked to recover for labor done in person by the party making the affidavit to foreclose; it not appearing from the testimony what part of the labor in making the crop was done by the plaintiff in person, or what was the value of such labor." Two points were made by counsel for the plaintiff in error upon this ground: (1) That the evidence having shown that the plaintiff and defendant had made a contract agreeing to run a farm together, she had no right to sue out a laborer's lien; and (2) that if she had such a right, she could only sue out the lien for the labor which she actually performed herself, and that she was not entitled to a lien for the labor of her minor children, or for that of extra hands whom she had employed for a few days during the year.

We do not concur with learned counsel in either of these propositions. The evidence shows that the plaintiff was not a renter, but was what is known as a "cropper." The relation of landlord and tenant did not exist between her and McElmurray. He was to furnish the land, mules, etc., and she was to furnish the labor and the crop was to be equally divided; and the evidence further shows that he was to control the crop until after the rent and advances had been paid.

Under the evidence, this was simply a mode of paying her wages for the labor of herself and children. She had as against him no title to any part of the crop which she raised, until the rent and advances should be paid. *Appling v. Odom*, 46 Ga. 588; *Almand v. Scott*, 80 Ga. 95. Her part of the crop which she had raised being in the nature of wages, she was entitled to foreclose

a special lien thereon after she had paid her rent and paid for the advances made to her by the landlord, which she alleges she did, and which the jury found to be true.

3. It appears that she had six minor children, two of whom only were able to work. It appears also that she was a widow and entitled to the possession of the minor children. Being entitled under the law to the possession of the children, she was entitled to their labor and earnings. If she had hired those minor children to the landlord, she could have recovered in an action against him for their hire. This being true, what rule is there in law and what reason is there in common sense which would prevent her from suing out a laborer's lien in her own name for the labor of her minor children as well as her own labor? If she had control of the children and they worked on her farm and under her direction, there being no contract made with the landlord as to their labor, they could not have foreclosed a lien therefor; yet under the construction contended for by counsel for the plaintiff in error, the landlord could have refused absolutely to pay for the labor of these children, and they would have had no summary remedy against the crop which they had helped to produce. We think, therefore, that the court did right in holding that the mother could foreclose her special lien on the crops raised by her, not only for her own labor but for that of her minor children.

The case of *Cochran v. Swann*, 53 Ga. 39, relied on by counsel for the plaintiff in error, was different in its facts from this case. In that case the person who sought to foreclose his lien was a contractor as well as a laborer. The record disclosed that the labor was probably done in large part by hands hired for the purpose; and this court, in ruling upon these facts, held that the contractor was not entitled to foreclose his lien for work and labor

performed by other persons whom he had hired. We think, where a parent makes a contract like the one disclosed in this record, and performs that contract with his own labor and that of his minor children, that he or she, under the code, has a lien and is entitled to foreclose it as was done in this case. And we do not think the fact that the plaintiff, in carrying out her contract, was compelled to employ for a few days extra labor, would prevent her from enforcing her lien against the other party to the contract, it appearing from the evidence that the defendant had advanced her the money to pay for this extra labor, and presumably the jury gave him credit therefor in the verdict.

*Judgment affirmed.*

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MAGRUDER, sheriff, v. THE CITY COUNCIL OF AUGUSTA,  
and *vice versa*.

Under the facts, the judge did not abuse his discretion in granting a temporary injunction.

November 21, 1890.

Injunction. Taxation. Before Judge RONEY. Columbia superior court. October term, 1890.

Petition for injunction by the city council against the sheriff, to restrain the enforcement of executions for State and county taxes for the years 1875-1889, issued by the tax-collector of Columbia county, and levied by the sheriff upon the bulkhead and dam of the Augusta canal and other property therewith connected in that county, assessed by the collector at \$40,000. The canal belongs to the plaintiff; it was constructed under act of the General Assembly of 1845, for the purpose, among others, of better securing an abundant supply of water to the city; and it extends seven miles from Augusta in Richmond county, a quarter of a mile of it (including its bulkhead and the dam across the Savannah river)

lying within Columbia county. It is alleged that the executions are illegal for several reasons, among them that the property is held by the plaintiff as public property, and as such it is exempt under the constitutions of 1868 and 1877 and the laws in pursuance thereof; that there is no provision of law or means for assessing or taxing it; that the canal would be valueless without the dam and bulkhead, and they would be valueless without it; that there is no legal authority for the assessment or taxation of the dam and bulkhead independently of the balance of the canal, of which they form a necessary part; that no machinery has been by law provided for the return of the property represented in the canal, for State and county taxes, and until such machinery is provided the property is not liable to taxation; and that the property levied on is not subject to taxation by Columbia county, because it does not lie within that county. Besides demurring generally, the defendant answered, setting up that the property levied on is located in Columbia county, and is not exempt from taxation, because the canal is not public property within the meaning of the constitution and of the act of December 11, 1878, as it is used by the plaintiff for the purpose of corporate profit and income. It appeared that the canal has been used for supplying the city with water for drinking, fire and health purposes, and, since 1884, by the public as a free, navigable water-way, and that the city rents water-power from it for manufacturing purposes. No assessment for taxation has ever been made against the canal property by Richmond county, nor by Columbia county until 1889. The judge overruled the demurrer, and held that the canal, so far as used for corporate gain, is liable for taxation, but as it is used also by the public without profit to the city council, its whole value should be ascertained and only so much of this value as is represented by the use for profit and

gain should be liable; that the executions, proceeding as they are against the assessed total value of the bulkhead, dam and locks, without any effort being made to separate the taxable from the non-taxable value thereof, should not be allowed to proceed for the whole amount claimed, it being apparent that in no event can more than a part be due; that this objection would apply even if the entire canal were liable to taxation, the evidence showing that the bulkhead, locks, etc. are worthless without the canal and the canal valueless without them, and there being no legal machinery to arrive at the uncertain and necessarily arbitrary values in the two counties; and that, there being no legal method for valuing the parts of the whole, and no effort to do so having been made in the assessment on which the executions issued, they should be enjoined until final hearing, when the other matters raised by the pleadings and evidence can be more properly disposed of. The defendant took exceptions to this decision; and by cross-bill the plaintiff excepted to so much of it as holds that any part of the canal is liable for taxation, alleging that it should have been held that the canal is public property and exempt from all liability to taxation.

FRANK H. MILLER and BOYKIN WRIGHT, solicitor-general, for the sheriff.

JOHN S. DAVIDSON, for the city council.

SIMMONS, Justice.

Under the facts in this case, the trial judge did not abuse his discretion in granting a temporary injunction. It was a wise and legal exercise of the powers of a court of chancery. As at present advised, we are inclined to think that the property levied on by virtue of these tax executions is public property, and all the income derived therefrom public income and not "used for purposes of private or corporate profit or income." If hereafter the

plaintiff in error shall insist upon a trial before a jury, and the evidence adduced at the trial shall turn out to be materially different from the facts as they appear in this record, we would not, if the case should again come before us, hold the present plaintiff in error bound by the above intimation, but would allow the case to be re-argued upon the new state of facts, or by throwing more light upon those now in the record. We will not deal with the cross-bill of exceptions filed by the defendant in error, further than we have done in the above intimation, as it does not except to the judgment of the court, but to the reasoning by which the court reached its conclusion; and besides, the same question as to the granting of a temporary injunction will not again arise in the court below.

*Judgment affirmed.*

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WILLIAMS v. WHEATON.

The plaintiff being administrator of his wife and co-heir with her son, and claiming independently of these relations a superior equity in the land to which one of the defendants holds absolute title as security for an advance made at the wife's instance in payment of the purchase money, the other defendant being the plaintiff's co-heir, the action is not multifarious because the plaintiff seeks not only to redeem the land and divest the wife's creditor of title, but at the same time to conclude his co-heir by having his own individual claim as the real owner recognized and adjudicated and a conveyance decreed directly to him from the wife's creditor instead of to the wife's administrator or heirs.

November 26, 1890.

Equity. Administrators. Debtor and creditor. Before Judge FALLIGANT. Chatham superior court. December term, 1889.

Reported in the decision.

T. S. MORGAN, Jr., for plaintiff.

J. R. SAUSSY, for defendant.

BLECKLEY, Chief Justice.

Wheaton demurred on the ground that the petition



is multifarious. The trial court sustained the demurrer. The action was brought against Wheaton and Fields by Williams, Williams suing in three capacities, to wit, in his own right, as heir at law of his wife, and as her administrator. Fields is the co-heir of Williams, being the son of Mrs. Williams by a former husband. The theory of the petition is that, as between Mrs. Williams and Wheaton, the estate of Mrs. Williams is entitled to a conveyance of a certain city lot which Wheaton holds as security for an advance made by him in payment of a part of the purchase money, this advance having been made at the instance of Mrs. Williams in her lifetime, and she having caused title to be conveyed to Wheaton as security for the same, though the deed is absolute upon its face. The plaintiff now proposes to satisfy Wheaton by reimbursing him for this advance. But this theory is qualified by another which affects the plaintiff as an individual, on the one part, and both defendants on the other, this being that Wheaton holds the title in equity and justice, not for the estate of Mrs. Williams, but for Williams himself, and consequently that a conveyance by Wheaton to the estate or the heirs of Mrs. Williams would not accomplish the result which all the equities involved in the matter require. The plaintiff sets up that he himself was the original purchaser of the land; that he took possession, made improvements and paid part of the purchase money; that he supplied his wife with money to pay for it, and she failed to apply the money but made a contract with his vendor in her own name and by the use of that contract procured Wheaton to advance money and take title from the plaintiff's vendor as security. Notice to Wheaton of the plaintiff's equity in the land is not charged, but this would seem to make no difference, for if Mrs. Williams, while acting as the agent of her husband, abused her agency by causing title to be conveyed

to Wheaton. Wheaton holds in trust for the husband and not for the wife, whether he was aware of the husband's equity or not. And it makes no difference to him that his true trust relation comes to light after the death of Mrs. Williams, provided he is not injured thereby. Williams, the plaintiff, offers to pay him in full and thus protect him against any and all injury. It can make no difference to him whether he executes the conveyance to Williams individually or to Williams and Fields jointly as the heirs at law of Mrs. Williams. He may safely do this upon a decree in the present action, for Fields will be bound by the decree, as will also the creditors of Mrs. Williams, if she has any, inasmuch as her administrator (Williams) is before the court. And it makes no difference whether he is there as plaintiff or defendant, or whether at his own suit or at the suit of another; he is competent to represent creditors both in gaining and losing assets by litigation with third persons, unless he commits some fraud in which those who litigate with him participate. Assuming this to be an honest action and Williams to have the rights in the land which he alleges (and this must be established by proof), there will be no danger to Wheaton in complying with such decree as may be rendered.

It is manifest that under the state of facts which the plaintiff alleges, it would be unsafe for him to appear merely as the administrator of his deceased wife in a suit to compel Wheaton to convey, because that would commit him to a false theory of his case. Were he to allege such facts only as appertain to the relation between Wheaton and Mrs. Williams, not disclosing those which affect the relation of himself and Mrs. Williams respecting this property, he would probably be estopped hereafter from asserting his individual claim in a contest with his co-heir. Certainly it would involve two suits instead of one to bring the title, which is now in

Wheaton, to its ultimate resting place in the plaintiff as an individual. The whole matter can be accomplished by one suit; and as the costs will be discretionary with the court, the expense, if any, will be as light to Wheaton as it would be if there was no controversy or ground for controversy between Williams and Fields. In fact, upon the allegations in the petition (and they are admitted by the demurrer), Wheaton is in the position of a mere stake-holder and might call upon Williams and Fields to interplead, were he disposed to do so. Perhaps it would be more accurate to say that this would be his position after accepting the money tendered him and before making a conveyance or being decreed to make it. We think the court erred in sustaining the demurrer.

*Judgment reversed.*

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LESTER v. HEIDT.

The memorandum made and signed by a real estate broker to authenticate a contract for the sale of land is insufficient if, though it states the price (cash), it refers to additional terms agreed on between the contracting parties, these terms not being evidenced by writing but left in parol.

November 28, 1890.

Contracts. Sales. Broker's memorandum. Before Judge FALLIGANT. Chatham superior court. June term, 1890.

Reported in the decision.

DENMARK, ADAMS & ADAMS, for plaintiff in error.

J. R. SAUSSY, *contra*.

BLECKLEY, Chief Justice.

The real estate alleged in the petition to have been the subject of sale and purchase was a certain plantation consisting of two lots of land. The broker's memorandum was as follows: "This is to certify that I have this day sold to D. B. Lester the property placed

86 226  
108 887  
86 228  
108 648  
86 228  
110 168  
86 228  
112 862  
86 226  
126 431

in my hands by Thos. P. Heidt for the sum of Four Thousand Dolls. (cash) on the terms that he, the said Thos. P. Heidt, agreed upon with the said D. B. Lester. (Signed) Robert H. Tatem, Real Estate Dealer, May 2, 1889."

We need not inquire whether the writing sufficiently identifies the property. It is fatally deficient in its failure to express a complete and entire contract. It discloses on its face that something more was agreed upon than is set forth. There were terms embraced in the convention between the parties of which the writing affords no evidence, save that they had been agreed upon and were terms additional to those stated in the writing. The instrument is silent as to what they were, but they are recognized as terms. That they were referred to at all indicates that they were material. According to the petition, they were in fact material, for it avers that out of the price of four thousand dollars named in the writing was to be retained by the purchaser eight hundred dollars to be applied to a mortgage with which the property is encumbered. No offer is made in the petition to pay the whole price, as a condition to the specific performance prayed for, but only to pay what remains after retaining eight hundred dollars or so much less as may be sufficient to discharge the mortgage. The writing construed without qualification by the unexpressed terms referred to, imports that the whole sum of four thousand dollars is to be paid; the petition seeks to have a conveyance decreed on paying less than that sum, and names eight hundred dollars less as the probable deduction contemplated by the parties on account of the mortgage. A deduction twice or thrice as great, and for any purpose whatsoever, even for liquidating a mortgage on some other property, would be quite as consistent with the memorandum and as fully comprehended in its phraseology as this. It is

obvious that all the evils of parol evidence might be realized as to a part of this contract, so much of it as is left out of the writing, were the present action held maintainable. The plaintiff might testify or bring witnesses to testify that the terms agreed upon were thus and so, and the defendant that they were wholly different. As well might the temptation to perjury pervade the whole contract as a material portion of it. The rule is that the writing, in order to be sufficient to satisfy the statute, must be coextensive with the stipulations; it must cover the entire contract. *Riley v. Farnsworth*, 116 Mass. 223; *Parkhurst v. Van Cortlandt*, 1 Johns. Chan. 273; *Williams v. Morris*, 95 U. S. 444; 1 Reed Stat. Frauds, §392; Brown Stat. Frauds, 4th ed., §§371a, 376; Wood Stat. Frauds, §371. There may be various writings provided they refer one to another, but they cannot be correlated and connected together by parol evidence. *North v. Mendel*, 73 Ga. 400. If parol evidence is incompetent to supply the connecting link between two writings, much more is it incompetent to supply some of the chain of the contract itself, though there may be a written link by which to attach it to that portion of the chain which the writing covers.

The present case is altogether unlike *Mohr v. Dillon*, 80 Ga. 572. There the broker knew what the contract was, attempted to enter the whole of it in his memorandum, and made written signs accordingly, but by reason of chasms and abbreviations the signs were ambiguous. Their meaning was not clear, and needed the light of surrounding circumstances and contemporaneous facts to explain it. Here the broker might or might not have known what the whole contract was, but certainly a part of it was unauthenticated by his signature, for he made no attempt to bring the terms agreed upon by the contracting parties between them-

selves within the purview of his memorandum. He purposely omitted them from the writing. In this respect the writing is not ambiguous, but certain, clear and definite. It hints at but one meaning, and expresses with conclusive certainty what it attempts to express. No amount of evidence consistent with its language could render its signification more obvious or intelligible. Its deficiency is one of omission, not of imperfect or obscure expression. Its infirmity is not doubtful or ambiguous speech, but utter silence. The case of *Johnson v. Ronald*, 4 Munf. 77, is not in point, for there the price was shown by the parol evidence not only to have been fixed but paid, and the vendee was in possession. The writing was therefore aided by part performance. Here, on the contrary, nothing whatever in the nature of performance is alleged, beyond tender or offer to pay in conformity to terms not expressed in the writing. The right to a conveyance in the present case depends alone on the sufficiency of the broker's memorandum. That being insufficient, there was no error in sustaining the demurrer.

*Judgment affirmed.*

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THE SAVANNAH, FLA. & WESTERN RAILWAY Co. v. SMITH.

The controversy being one of fact only, a third verdict for the plaintiff not being excessive in amount, and the evidence, taking it in its utmost force, letter and spirit, in favor of the plaintiff, being sufficient to warrant a recovery, a fourth trial should be denied.

November 28, 1890.

Verdict. New trial. Railroads. Damages. Negligence. Before Judge FALLIGANT. Chatham superior court. June term, 1889.

Reported in the decision.

CHISHOLM, ERWIN & DUBIGNON, for plaintiff in error.

DENMARK & ADAMS, *contra*.

BLECKLEY, Chief Justice.

This is a third verdict in favor of the plaintiff below, defendant in error here. The first was for \$7,500, the second for \$10,500 and the third and last for \$7,000. Upon the second grant of a new trial, the case was brought here by Smith, and will be found reported in 84 Ga. 698. In affirming the judgment granting a new trial, this court distinctly announced that the matters in controversy, including the diligence of the respective parties, were for determination by the jury. The case was said to be an exceedingly close one, and had not the verdict been for so large a sum, it is not improbable that the judgment granting a new trial would have been reversed. The last verdict seems reasonable in amount, and while the motion for a new trial complains of it as excessive, we can realize no shock from it to our moral sense, nor can we discover in the facts of the case any cause why it should shock the moral sense of others. The injury was a very serious one, resulting in the mutilation of a boy under ten years of age for life, to say nothing of pain and suffering. The other grounds of the motion for a new trial are that the verdict was contrary to law, to evidence and to the weight of evidence. In dealing with a third verdict, the law is satisfied with the evidence if, upon the most favorable view that can be taken of it in behalf of the prevailing party, and counting as nought all conflict, the jury could have reached the conclusion at which they arrived. In this instance, accepting the evidence of the plaintiff himself and that of his other witnesses, the jury would not only be warranted in their finding, but almost constrained to find in his favor. Indeed, that the injury was caused by the running of the cars, is not even disputed; and it devolved upon the railway company to make it appear that their agents had exercised all ordinary and reasonable care and diligence. Code, §3033. Perhaps, under

the peculiar circumstances of this case, this burden may not have rested on the company, had it not been established that the public crossing was unwarrantably obstructed by the cars and occasion thereby given for going round and crossing in an unusual place to avoid the obstruction. But there was ample evidence to justify the jury in reaching such a conclusion. In the final stages of the investigation, therefore, it was for the company to vindicate the diligence of its employees in all respects, and not for the plaintiff to impeach their diligence beyond showing the fact and manner of his injury. And being himself a child under ten years of age, the jury, in passing upon his diligence, might properly have let him off with a very moderate degree of care, owing to his long detention at the crossing by the train which obstructed him on his way home, and owing to his anxious state of mind, on account of the lateness of his return home from school and the probability that he would incur parental censure, if not punishment, for his tardiness. It was insisted in argument before us that, unless there were two locomotives on the ground, the injury could not have happened in the way detailed by the plaintiff. According to the plaintiff's evidence, there might have been two. Therefore it is not impossible that, if two were necessary, the conditions were met. There is no negative upon these conditions save from the company's witnesses. Besides, the jury have disposed of this problem with all other questions of fact involved in the case. There was no error in not having a fourth trial.

*Judgment affirmed.*

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LEE v. THE CENTRAL RAILROAD AND BANKING COMPANY.

The presence of one clinker of unusual size on the margin of a railway track where switching is to be done, and on which a brakeman accidentally steps in descending from a moving engine in the due course of his duties, will not render the company liable to

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answer for a personal injury which the brakeman thus sustains. For outdoor premises to be reasonably safe, it is not required that the surface shall be kept clear of every object which by chance might cause accidental injury.

November 23, 1890.

Negligence. Railroads. Practice. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

GARRARD & MELDRIM, for plaintiff.

LAWTON & CUNNINGHAM and E. S. ELLIOTT, for defendant.

BLECKLEY, Chief Justice.

This being the first grant of a new trial, we should leave it to the general rule, were it not that, upon looking into the evidence, we are of opinion that a new trial would be wholly superfluous. For the plaintiff was his own witness, the defendant introduced no evidence, and on the case made by the plaintiff himself there can be no recovery. His injury was purely accidental. He was probably faultless himself and he certainly shows no fault on the part of the company, unless the company is to be treated as an insurer against accidents to its employees, which, of course, is not its legal character or relation. He was a brakeman and in the course of his duty stepped from the engine to the ground, the engine being in motion. In so doing he struck his right foot against a large clinker of coal-dross five or six inches through one way, and three or four inches the other. It was nearly covered up with other dross from the engine which he stepped into. That dross consisted of rakings from the furnace. These rakings do not generally consist of pure ashes, but sometimes have clinkers—generally so, unless they have been walked over long enough to be broken up. Frequently clinkers are so soft that walking over them will break them, and he had broken many. Generally a

good many piles of this dross are along the track. He could not say how far this particular pile extended. He had seen piles two hundred yards long. Dross that comes from the engines is taken from the side of the track and used for ballast between the rails. At that time, a construction train was engaged in such removal. This particular clinker was of unusual size, the average being about as large as a hen-egg. We have said the injury was an accident. It might be termed a double-barrelled accident. First, one clinker of unusual size got into a pile of dross, and secondly, the plaintiff happened to step out upon that particular pile and struck his foot against that particular clinker. There is no suggestion that the condition of the track or the neighboring surface was unsafe, save in that one spot, and there is no suggestion that the plaintiff's duty required him to step off at that spot rather than any other. Had it not been for the mere chance of his selecting the particular few inches of space occupied by that one clinker, he would have, in all probability, performed his duty in safety. It cannot be incumbent on railroad companies or any one else in such a world as this, to keep the whole face of the earth on which servants and employees are to execute their functions clear of every object that may cause an employee to slip up or be thrown down. Such a rule would require that farmers should keep their premises clear of corn-cobs; for a cob, when stepped upon, may roll under the foot and produce a fall. So of small stones and sometimes sticks or other rubbish. The plaintiff's injury was simply a misfortune, the incident of his employment and of the risk consequent thereon.

In the exercise of our power of direction, we direct that the court enter judgment for the defendant below as in case of nonsuit, and that the motion for a new trial and the judgment thereon be of no effect, except

to set aside the verdict and as a basis for this writ of error and a final disposition of the case.

*Judgment affirmed.*

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COOPER v. BRANCH.

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Where the court submitted to the jury various questions for them to answer, and they returned a verdict in which some of the questions were specifically answered but others were answered simply by saying, "we do not know; not known to us; refer to the court," etc., the court, being unable to base any decree upon such verdict, could well have refused to receive it, and have declared a mistrial; and the grant of a new trial was correct.

November 26, 1890.

Verdict. Practice. New trial. Before Judge FALLIGANT. Chatham superior court. March term, 1890.

For the facts of this litigation see the former report in 82 Ga. 512. The defendant excepted to the grant of a new trial after the second trial.

DENMARK & ADAMS, for plaintiff in error.

GEORGE A. MERCER, *contra*.

BLANDFORD, Justice.

On the trial of this case in the court below, the court submitted to the jury various questions for them to answer. The jury returned a verdict in which several of the questions were specifically answered, but others were answered simply by saying, "We do not know," "Unknown to us," etc. Following are the questions submitted by the plaintiff in error (Cooper), with the answers of the jury thereto: (1) "Was the defendant, Mr. Cooper, guilty of any fraud, deceit or bad faith of any kind in this transaction? Answer: No." (2) "Would Mr. Cooper have accepted less for his interest, had there been no error in the keeping of the books, than what was paid him? Answer: We do not know." (3) "Can the mistake made in the keeping of the books be now

corrected without injustice to Mr. Cooper? Answer: Yes." (4) "In view of all the circumstances of this case, as a matter of natural justice and equity, ought Mr. Cooper to refund to Mr. Branch anything? Answer: Yes." (5) "If you answer 'yes' to the last question, how much do you find that Mr. Cooper should refund? Answer: One dollar and costs."

Following are the questions which were submitted by Branch, the defendant in error, with the answers returned by the jury: (1) "Would Mr. Branch have paid Mr. Cooper ten thousand dollars (\$10,000) for his interest in the firm had he known at the time of the mistake in the books? Answer: We do not know." (2) "If not, what sum would Mr. Branch have paid Mr. Cooper for his interest had he been aware of the mistake and known the true state of the accounts? Answer: Not known to us." (3) "If the jury should find that the interest of Mr. Cooper in said firm sold to Mr. Branch was worth more than five thousand one hundred and eighty-two dollars and twelve cents (\$5,182.12), as shown by the corrected books, the jury will state just what such interest under the evidence was worth. Answer: Refer to the court." (3) "Was or was not Mr. Cooper's interest in the lease in the stand and in the entire business of Branch & Cooper estimated in the price of ten thousand dollars paid by Mr. Branch and included in the property and interest conveyed by the bill of sale to Mr. Branch? Answer: It was." (5) "Has any evidence been submitted to the jury showing that Mr. Cooper has suffered any damage by reason of the sale of his interest to Mr. Branch? and if yes, state the amount of the damage so proved. Answer: No" (6) "When Mr. Branch purchased Mr. Cooper's interest in said firm, was there or not a mistake in the books of said firm by which the apparent interest of each partner was represented to be larger in amount

than it was in fact? If yes, in what amount was such interest overstated on said books? Answer: Yes, according to the showing of the books." (7) "When Mr. Branch purchased Mr. Cooper's interest, did he or not base his offer upon the amount of Mr. Cooper's interest as it appeared on said books? Answer: He accepted Mr. Cooper's offer."

We do not think the court should have received this verdict under the facts of this case; that, in fact, it was no verdict; certainly not such a verdict as a decree could be based upon. We think the court could very well have refused to receive the verdict, and declared a mistrial. A motion was made for a new trial, which the court granted, stating that he was not satisfied with the conduct of the jury. We are of the opinion that the court did right to grant a new trial; and that, upon a future hearing of the case, proper questions should be submitted to the jury, which they should be required to answer, and upon the answers to which a decree can be made. The judgment of the court below granting a new trial is

*Affirmed.*

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DANIELS v. SAVANNAH, FLA. & WESTERN RAILWAY Co.

For the homicide, by the negligence of a railroad company, of her child unmarried and childless, a mother may recover, where the child contributed to her support and she was substantially dependent upon such child in part for support, although she was likewise dependent upon her husband and her own labor.

November 26, 1890.

Parent and child. Nonsuit. Before Judge HARDEN. City court of Savannah. May term, 1890.

Reported in the decision.

R. R. RICHARDS and W. R. LEAKEN, by brief, for plaintiff.

CHISHOLM, ERWIN & DUBIGNON, for defendant.

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BLANDFORD, Justice.

When the plaintiff had submitted her evidence to the jury, the court awarded a nonsuit, and plaintiff excepted. The plaintiff showed by her testimony that she was dependent upon her son, her husband and upon her own labor for a support; that her son contributed in part to her support. We think the court misapprehended the decision of this court in the case of *Clay v. The Central Railroad and Banking Co.* (decided on the 10th of February, 1890, and reported in 84 Ga. 345), wherein it was held that under the act of October 27th, 1887 (amending §2971 of the code, relating to the recovery of damages in cases of homicide, and extending the right to recover to the mother or father for the homicide of a child upon whom she or he might be dependent or who contributed to her or his support, in cases where the child left neither wife, husband or child), a mother cannot recover for the homicide of a child who contributed to her support without showing that she was dependent upon him. This court did not mean by said decision to decide that the mother could not recover unless she was *wholly* dependent upon such child for a support, but on the contrary, we think the meaning of the statute is that a mother may recover for the homicide of a child who contributed to her support when she was in whole or in part dependent upon such child for support substantially. We think the words used in the statute "who contributes to his or her support" mean that the contribution to the father or mother by the child need not be wholly sufficient, but only such as is in part sufficient for such support; and that the word "dependent" means wholly or in part dependent materially upon such child for support. For instance, a mother may have several children who support her or contribute to her support, and she may not be dependent upon one child more than another; yet, if she

should be dependent upon any one of them wholly or partially, and he contributed to her support, she would be entitled to recover for the homicide of such child if killed by the negligence of any railroad company, its servants or employees.

We think the evidence submitted by the plaintiff in this case was sufficient to carry the case to the jury, and therefore that the court erred in awarding a nonsuit, upon any ground taken in the motion. The judgment of the court below is

*Reversed.*

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#### JOINER v. THE OCEAN STEAMSHIP COMPANY.

1. The verdict was in accordance with law and evidence.
2. In action for malicious arrest and false imprisonment the burden is on the plaintiff to show malice which induced the prosecution, and the want of probable cause. Malice may be presumed from a total want of probable cause for the prosecution; but where probable cause is shown, it is immaterial that the defendant was induced to prosecute from motives of malice.
3. The law as to effect of advice of counsel as bearing upon the question of probable cause, was properly given in charge to the jury.
4. Where a warrant is regular and properly sued out, and the prisoner has been properly and legally arrested under it, the imprisonment cannot be false.
5. The facts of the case clearly show that, at the time the warrant was taken out and the plaintiff arrested, the defendant had probable cause to believe that the plaintiff was guilty of the offence with which he was charged.
- (a) Failure to give charges requested which are fully covered in the general charge, is not ground for a new trial.

November 26, 1890.

Malicious arrest. False imprisonment. Verdict. Charge of court. Malice. Probable cause. Advice of counsel. Before Judge FALLIGANT. Chatham superior court. June term, 1890.

The evidence tended to show the following: On March 8, 1889, one Ganey, acting for the defendant, swore out a warrant and had the plaintiff arrested on

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the charge of larceny from a vessel. He was kept in jail until March 22d when, after an examination before a magistrate, he was discharged. He was earning at the time he was arrested \$1.75 per day, from \$10 to \$12 per week, and since then has only been able to earn from \$3 to \$6 per week. He had worked regularly with defendant for nine years; has tried to get defendant to employ him again, but it refused because it said he was implicated in this larceny. He had to pay \$50 counsel fees to obtain his discharge. He testified that he was not guilty of larceny and had never been charged with any crime. The larcenies in question were committed from the defendant, and their counsel prosecuted the case. Eighteen men were arrested, of whom fifteen were discharged on preliminary examination, two were convicted and one not prosecuted. Plaintiff remained in jail because the prosecutor could not be found when the case was set for hearing. Ganey was a detective, and obtained the information on which he swore out the warrant from Barcus Butler, Phillip Hargrove, and Calvin Petticooler; and Sergeant Muse told Ganey that some one had told him that larcenies were being committed from the steamers. Ganey learned that larcenies which were supposed to be committed on the line of the railroad were really done on the steamers. After Barcus was arrested, Ganey told him it would be better for him to tell the truth, and he gave Ganey the names of his gang and told of their having stolen three boxes of cigars on the steamer; but at the time of the trial Ganey could not find out anything about the cigars, though some two months afterwards a claim was made for three boxes of cigars. Barcus told Ganey that the plaintiff and the balance of Billy Green's gang had been implicated in stealing from defendant. Ganey saw defendant's counsel and the solicitor-general and told them what Barcus had told him, and they advised the



arrest; he did not tell them of the promise he held out to Barcus, as he did not consider it binding or that it amounted to anything. Barcus afterwards made a statement when in jail, but denied it when put upon the stand to testify. Ganey believed Barcus' statement to be true when he made it, but did not believe what Hargrove said. He did not deem Petticooler's evidence at that time sufficient, if Barcus Butler could not be got to testify to the truth, to make a case. The arrests were made mainly on the statement of Barcus, though they had also the statement of one Western to Muse, that cigars had been given to men on board the vessel. Western was probably not used as a witness on the commitment trial, and the prosecution did not have any testimony that it thought was reliable. Barcus at the time he made his statement made it so direct, and gave such a fair showing as to what was done, by stating circumstances, etc., that the prosecution, including Ganey, believed he was telling the truth; that statement had all the appearance of truth. Ganey testified that he did not give Barcus any liquor; and the magistrate before whom the plaintiff was carried, also testified that Ganey did not give Barcus any liquor, and that Barcus was perfectly sober and made to Ganey detailed statements which he afterwards denied. Barcus testified that Ganey told him if he would give the names of his gang and implicate them in the stealing, he would send him (Barcus) to jail, but after he had gone before the grand jury he would have him discharged and give him a good job on the wharf; that he gave him whiskey to drink, and he was tight, not drunk; that he gave him the names but did not say plaintiff had been guilty of stealing. As to the statement which it was claimed he made in the jail, he testified that Ganey had made memoranda of it before coming to the jail and asked him if they were true, and then had some one write

them down. He denied the statement, made by Ganey and the magistrate, that he accused the other men of theft.

The jury found for the defendant. The plaintiff moved for a new trial on the grounds stated in the opinion. The charges requested, the refusal to give which was assigned as error, were as follows: (a) If this defendant had this plaintiff arrested and imprisoned under a warrant, and the jury find that the warrant was issued maliciously and without probable cause, the imprisonment under the warrant would be false imprisonment and this plaintiff would be entitled to recover for such false imprisonment. (b) The good faith of the arrest must be determined by all the circumstances of each case. (c) An arrest under process of law made maliciously gives a right of action. (d) Belief of probable cause does not amount to probable cause; reasonable grounds for the belief must be shown. (e) A voluntary discontinuance of the prosecution is *prima facie* evidence of the existence of malice. (f) If the jury find that this plaintiff was arrested at the instance of defendant or its agents, was detained in jail for a length of time, and was then discharged without an examination or trial of the charge on which he was arrested at the instance of defendant, they would be authorized to consider such discharge as *prima facie* evidence of malice. (g) The master is liable for the act of his servant though he did not know of the act, and it matters not whether the wrong resulted from the servant's mere negligence or from wanton recklessness to accomplish the business entrusted to him in an unlawful manner. (h) Wherever intention is involved as an element of aggravation, advice of counsel is pertinent though not receivable as justification. The offer to prove advice, to be available, should embrace an offer to show that the advice sought and given was based on the actual case.

The charges excepted to are as follows:

(a) "This is a suit by Washington Joiner against the Ocean Steamship Company for damages. Counsel for plaintiff claim it to be, as I understood them, a suit for malicious arrest and false imprisonment. The doctrines of law with reference to recovery or non-recovery are identical, so it makes very little difference; but I think, if it appears from the evidence that the arrest was made under a legal warrant properly sued out before a magistrate authorized to issue a warrant, that it is properly a case to be brought under the law of malicious prosecution, and to be tested by the principles of that law. As I understand the law of false imprisonment, when one seeks to make an arrest it is his duty to do so lawfully, and if he cannot immediately obtain a warrant the party should carry him as quickly as possible before a magistrate and get out a warrant. If he should remand him without a warrant, or without bringing him before a magistrate or proper officer to issue a warrant within a reasonable time, that would be what the law terms false imprisonment.

(b) "Want of probable cause is a matter for you to determine under all the facts and circumstances of the case. For instance, if it appears from the evidence that thefts had been committed, that an investigation was going on as to who was the criminal, that one of a certain gang made a confession and named this plaintiff as one of the parties engaged in it, and that the party to whom these statements were made went to counsel and laid before him, *bona fide*, the information he had obtained, and was advised by counsel that that was good ground for making an arrest, and if, not satisfied with that, he further went to the prosecuting officer of the government and laid before him the facts, *bona fide*, and was advised by him that it was good ground for making an arrest, and under such advice

swore to the affidavit necessary to obtain the warrants and arrested this party,—these are circumstances for you to consider in determining the *bona fides* of the arrest, in determining whether he acted without probable cause or with probable cause, and whether he acted from malice or without malice. It is a matter, gentlemen, for you to determine, and I charge you that while the wrong advice of counsel is not a defence—an absolute defence to a party who injures another, yet, in determining the question of probable cause and malice, it is a circumstance which the law allows to go in evidence before you, to assist your investigation in coming to a conclusion upon that subject; and even if you find, under the law as given you in charge and the facts of this case, that the defendant is liable, the advice of counsel, his method of taking and his action under it is also a matter to be considered in mitigation of damages, and in determining whether the tort is an aggravated tort or not.

(c) “~~You~~ are to look into the facts of the particular case before you, to put yourself in the position of the party who swore out the warrant in this case, and determine, under the law as given you in charge and the facts, whether he had probable cause at that time, the time he swore out the warrant. When the agent of this company went before the magistrate with a statement of the evidence as to the theft, and made out the affidavit, his *status* at that time, under all the facts and circumstances of the case, should enter into your investigation. The fact that the party upon whose testimony he relied afterwards disclaimed having ever given any such evidence or information, is not to determine his *status* at the time he swore out the warrant, if at that time you believe from the evidence that the information was given.”

GEORGE W. OWENS, by J. R. SAUSSY, for plaintiff.

LAWTON & CUNNINGHAM and E. S. ELLIOTT, for defendant.

BLANDFORD, Justice.

This was an action, brought by the plaintiff in error against the defendant in error, for malicious arrest and false imprisonment. A verdict was had for the defendant in error; plaintiff in error made a motion for a new trial, which was refused by the court, and he excepted.

The first three grounds of the motion allege that the verdict was wrong. In looking at the facts in the case, we are satisfied that the verdict was right according to law and the evidence.

It is complained in the fourth ground that the court erred in refusing to give certain requests to charge to the effect that malice was presumed from the voluntary discontinuance of the prosecution, and that the burden of proof was on the defendant to show probable cause. We think, in an action of this sort, the burden is on the plaintiff to show malice and want of probable cause which induced the prosecution. It is true that a jury may presume malice where there is a total want of probable cause for the institution of the prosecution; but where probable cause is shown, it would make no difference whether the defendant was induced to prosecute the case from motives of malice or not. In all actions of this kind there must appear both malice and a want of probable cause.

The fifth ground excepts to certain charges given by the court to the jury. It is alleged that the court improperly charged the jury as to the effect of advice of counsel as bearing upon the question of probable cause. We think, in looking at the charge of the court, that the law upon this subject was properly given in charge to the jury.

It is further complained that the court erred in its

instructions to the jury as to false imprisonment. Where a warrant is regular, properly sued out, and the prisoner has been properly and legally arrested under such warrant, the imprisonment cannot be false under our law. We think the court fairly and correctly submitted the law upon this subject to the jury, and therefore the plaintiff in error can take nothing from this assignment of error.

The next ground of error insists that the question of probable cause should be adjudged by the *status* of the defendant at the time of the trial, and not when the prosecutor swore out the warrant; and that the charge of the court in this respect was erroneous. We think, under the facts of this case, it is shown very clearly that, at the time the warrant was taken out and the plaintiff in error arrested, the defendant in error did have probable cause to believe that the plaintiff in error was guilty of the offence for which he was arrested. An action of this character is strictly guarded, and the circumstances under which it may be maintained are accurately stated. It is never encouraged except in plain cases. Were it otherwise, ill consequences would ensue to the public, for no one would willingly undertake to vindicate a breach of the public law, and to discharge his duty to society, with the prospect of an annoying suit staring him in the face. *Ventress v. Rosser*, 73 Ga. 541. A want of such probable cause is a question for the jury under the direction of the court, and exists only when the circumstances are such as to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. Code, §2983. See *Henderson v. Francis*, 75 Ga. 180. "To make out probable cause, it is sufficient if the plaintiff has reasonable grounds for belief at the time of acting. Statements made by third persons to the defendant may be introduced in order to show probable cause." French

*v. Smith*, 24 Am. Dec. 616. See, also, *Cockfield v. Braveboy*, 39 Am. Dec. 123; *Coleman v. Allen*, 79 Ga. 637. "An abandonment of the prosecution, or an acquittal for want of evidence, is, as we have seen, no proof of malice, or of the prosecution being unfounded and unjust." *Purcell v. McNamara*, 1 Camp. 202, 9 East, 363. And see 2 Greenlf. Ev. §§453, 454, 455; 2 Starkie's Ev. 494; 3 Phillips' Ev. 256. The entire burden is on the plaintiff to show want of probable cause. *Lindsay v. Larned*, 17 Mass. 190; *Adams v. Lester*, 3 Black (Ind.) 443. Where a request is made of the court to charge the jury, and the point is covered in another portion of the charge, this is no ground for a new trial. We think the charge of the court as to advice of counsel was correct. See *Fox v. Davis*, 55 Ga. 302; Code, §§2982, 2986, 2988, 2990, 2991. And see case of *Finley v. St. Louis Refrigerator Co.*, 13 S. W. Rep. 87. Where the arrest is by valid process regularly sued out, action for malicious prosecution is the only remedy. *Melson v. Dickson*, 63 Ga. 682; *Riley v. Johnston*, 13 Ga. 260; *Sewell v. State*, 61 Ga. 496.

We think, in looking into the charge of the court, that the law governing the case was fairly and correctly submitted to the jury, and that the charge fully covered the requests of counsel for the plaintiff in error, the refusal to give which is assigned as error.

*Judgment affirmed.*

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#### ALEXANDER v. THE STATE.

1. The business of buying and selling what are commonly known as futures, being gambling, is not protected by the interstate commerce clause of the constitution of the United States. Therefore the resident agent of persons in New York, who took orders in this State for cotton futures to be executed in New York, and who failed to register his name and place of business and pay the license tax as required by the general tax act for 1889 and 1890 was liable to the punishment prescribed by that act.

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2. It is not contemplated by the statute that, in order for it to apply, the contract for buying or selling futures shall be completed by the individual or the agent who is engaged in the business.

November 23, 1890.

Criminal law. Charge of court. Taxation. License. Constitutional law. Interstate commerce. Contracts. Futures. Principal and agent. Before Judge EVE. City court of Richmond county. May term, 1890.

Reported in the decision.

LEONARD PHINIZY, for plaintiff in error.

C. H. COHEN, solicitor, *contra*.

SIMMONS, Justice.

The general tax act for 1889 and 1890, in the 18th paragraph of section 2 (Acts 1888, p. 22), levies a license tax as follows :

"Upon every individual or firm, or his or their agents, engaged in the business of selling or buying farm products, sugar, coffee and salt and meat for future delivery (commonly called 'futures'), five hundred dollars each per annum for the county where such business is carried on: *provided*, that this tax shall not be demanded of any cotton warehouseman, dealer in cotton or any provision broker, who takes orders in the regular course of their trade only for the actual and *bona fide* delivery of cotton and other produce so ordered, and where, by the terms of the contract, it is not left to the option of the party so ordering, or the party taking such order, to avoid the delivery of the produce or products by paying the difference in the market price of such produce or products at the time of delivery: *provided, further*, that such cotton warehouseman, dealer in actual cotton or any provision broker does not carry on the business of buying futures in connection with his or their other business."

Section 4 of the act provides, in substance, that before any person taxed as above provided for shall be authorized to carry on said business, "they shall go before the ordinary of the county in which they propose to do business, and register their names, place of business, and at the same time pay their taxes to the tax-collector. . . Any person failing to register with the ordinary as herein required, shall be liable to indictment for a misdemeanor, and on conviction shall be



fined not less than fifty dollars nor more than two hundred dollars, at the discretion of the court trying the same, or be imprisoned as prescribed by section 4310 of the code."

It appears from the record in this case that Alexander, the plaintiff in error, failed to go before the ordinary and register his name and place of business, and to pay the license tax to the tax-collector. He was indicted, tried and convicted under this act. He moved for a new trial upon the several grounds set out in his motion, which was denied by the trial judge, and he excepted.

The plaintiff in error contends that the court erred in refusing to give the following in charge to the jury: "The act of December 26th, 1889, was not intended to apply to parties non-resident soliciting orders in this State and executing said orders out of this State for future delivery of cotton. To make it apply to such parties would be to make it violate art. 1, section 8, par. 3 of the constitution of the United States, and I so charge you." And he further complains that the court erred in substituting in lieu thereof this language: "I give you in charge this part of the third request with this qualification, viz. provided the contracts were such as could not be avoided by payment of the actual price or the difference in price at any time."

To treat this exception technically, there are two reasons why the judge should not have given this request in charge: (1) Because there was no act of December 26th, 1889, on the subject, the act applicable being the act of December 26th, 1888; and (2) it does not appear that Alexander, the defendant in the court below, was a non-resident of the State of Georgia soliciting orders in this State, but it does appear that he was a resident of the county of Richmond in this State, where he was indicted. It would seem to be the

theory of the plaintiff in error that Hubbard, Price & Co., for whom the defendant appeared to have been agent, were on trial, and not the agent himself. Waiving, however, these technical objections, and coming to the question made before us in the argument, to wit, whether the act, if to be applied to Alexander, the defendant, was in violation of the constitution of the United States because it interfered with interstate commerce, we do not think it was error to refuse the request. We do not think the business of buying and selling what are commonly known as "futures" is protected under the interstate commerce clause of the constitution of the United States. This court and many other courts in this country have held that this business is gambling. *Cunningham v. National Bank of Augusta*, 71 Ga. 400; *National Bank of Augusta v. Cunningham*, 75 Ga. 366; *Walters v. Comer & Co.*, 79 Ga. 796; *Embrey v. Jemison*, 131 U. S. 386; *Irwin v. Williar*, 110 U. S. 499; 8 Am. & Eng. Enc. of L., p. 1005, and cases cited.

If, therefore, the business of buying and selling futures is gambling, it is not protected by the interstate commerce clause of the constitution of the United States. As was well said by the solicitor-general in the argument of this case, that clause protects interstate commerce, but does not protect interstate gambling. For a discussion of a case somewhat analogous to this, see *Fortenbury v. State*, 47 Ark. 188.

The next complaint is made in the 5th and last ground of the motion, which is that the court erred in charging as follows: "If you find from the evidence that Alexander was the local agent of Hubbard, Price & Co. for the sale or purchase of future cotton, and that he took orders (only) here, and that he received margins here, and sent them to New York, and that all losses were paid in New York through him, and all statements and profits were sent out from New York here to him,

and all settlements were made in New York, but through him here, and that a party could settle his contracts at any time he chose in New York through the agent here (Alexander), and that he had not paid the tax, then I charge you that this would amount to Hubbard, Price & Co. doing a future business here in this State, and the defendant would be guilty, and you should so find."

In our opinion, this charge was substantially correct. The statute requires registration and the payment of the tax by every individual or firm, or agent, "engaged in the business of selling or buying" futures, and does not, in our opinion, contemplate that the selling or buying must be complete in order for the statute to apply. If one engages or holds himself out as engaged in this business, he must register and pay the tax; and to engage in the business it is not necessary that he shall complete the sale or purchase. The same act levies a special tax upon every practitioner of law, of medicine or of dentistry, upon every president of a bank, upon each agent or firm negotiating loans, and upon those engaged in various other occupations. A lawyer or physician who holds himself out as engaged in his particular line of business could not avoid the tax because of his failure to secure a client or patient; and we think it is equally clear that one who holds himself out as an agent for the selling and buying of futures cannot claim exemption because he does not complete the purchase or sale of any future contract. It is not necessary under this act for one man to complete the contract; it may take two or more to carry on the business. If one is connected with others who are engaged in the business and his part is to lead to or aid in the selling or buying, he is "engaged in the business of selling or buying" within the meaning of the act, just as much as if he completed the contracts himself. If this defendant was the agent in this State of a New

York firm engaged in the selling and buying of futures, and his part of the business was to secure orders for future contracts to be placed in New York, and to collect from the customer the money paid for "margin," and if the customer made a profit pay him his profit upon the closing out of the contract, he was "engaged in the business of selling or buying" futures in this State, and the statute applied to him just as it would if he had completed the whole transaction in this State. The evidence shows that the defendant's part of the business was to solicit customers in this State, and when he obtained one, to receive the customer's money and telegraph his offer to New York, and if the offer should be accepted, to forward the money; and if the customer won in the game carried on in the cotton exchange of New York, the defendant was to pay him the profit, and if the customer lost, he collected the loss. Under this state of facts, we think the court correctly charged the law, and that the verdict of the jury was authorized by the evidence.

*Judgment affirmed.*

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86	251
104	439
86	251
116	806
86	251
120	759
86	251
122	648

COLES, SIMKINS & COMPANY v. THE CENTRAL RAILROAD  
AND BANKING COMPANY OF GEORGIA.

Where cotton was delivered to a railroad company for shipment to its own terminus and thence to another point over a connecting line of the same gauge of track, but the initial company refused to issue through bills of lading on full car-load lots, though the shippers offered to pay commission rates for doing so, and upon this refusal the shippers took local bills of lading to the terminus of the initial company and then notified its agent to deliver the cotton to the connecting line all in car-load lots, and this not being done they were compelled to haul it on drays to the warehouse of the connecting line, there was no liability on the part of the initial company for damages or the penalty prescribed in the act of 1874 as amended by the act of 1883.

- (a) A railroad company is not compelled to make a contract to forward goods beyond its own line; though if it should make such a contract and fail to carry it out, it would be liable in damages.

The requirement of the statute that the company shall, at its terminus or any intermediate point, switch off and deliver to the connecting road having the same gauge, all cars passing over the line of the former or any portion of the same containing goods or freights consigned to any point over or beyond such connecting road, means that if the initial company receives cars from another line consigned to a point beyond its terminus, it shall deliver them to the connecting road running to that point; but there was no intention to compel one company to furnish its own cars to another without any compensation for their use.

- (b) That the defendant in other instances did ship cars from its initial to its terminal point, and thence over the connecting line, does not affect the case.

November 23, 1890.

Carriers. Railroads. Contracts. Statutes. Before Judge FALLIGANT. Chatham superior court. December term, 1889.

Reported in the decision. For former report, see 82 Ga. 149.

GARRARD & MELDRIM, GOODYEAR & KAY and D. H. POPE, for plaintiffs.

LAWTON & CUNNINGHAM, for defendant.

SIMMONS, Justice.

The plaintiffs in error brought their action against the railroad company for damages, and alleged, in substance, that during the cotton season they purchased, at several places on the defendant's line, cotton for shipment to Brunswick *via* the Central railroad to Albany, and thence *via* the Brunswick & Western railroad to Brunswick, the Brunswick & Western being of the same width of track or gauge, and connecting with the Central at Albany; that the defendant refused to issue through bills of lading in full car-load lots for this cotton, and the plaintiffs took local bills of lading to Albany, and were compelled to dray the cotton from the Central railroad warehouse at Albany to the Brunswick & Western warehouse; that plaintiffs had offered to pay the commission rates from Americus to Albany,

etc., and from Albany to Brunswick, if the agents would give through bills of lading on full car-load lots, which the defendant refused; that after the cotton was received by the Central railroad, and bills of lading to Albany had been issued for it, plaintiffs notified the Central railroad agent at Albany that he must deliver it in the yard of the Brunswick & Western in all car-load lots. Other allegations are made in the declaration as to the negligence of the defendant in wilfully detaining the cotton at Albany, and as to shipping cotton from Macon, a competing point with the East Tennessee railroad to Brunswick. They claimed a large amount as damages, including the penalty prescribed by the statute of not less than ten per cent. nor more than twenty-five. To this declaration several demurrers were filed by the defendant, which were sustained by the court and the case dismissed.

This action was brought under the act of 1874, as incorporated in the code, §§719(q) *et seq.*, and amended by the act of September 28th, 1883. Acts 1882-3, p. 145. The gist of the action is the refusal of the defendant to make a contract with the plaintiffs for the transportation of their cotton from the several points on the line of the defendant, over its own road and over the Brunswick & Western road to Brunswick. We do not think that either the act of 1874 or the amendatory act of 1883 applies, under the facts set out in the declaration. These acts certainly do not force or compel any railroad company in this State to make a contract to forward goods beyond its own lines; nor do we think such was the intention of the legislature. Under the common law, the carrier could only be compelled to receive goods and carry them to the end of its own line; and this statute does not add any further compulsory duty upon the railroad.

It is argued, however, that the statute requires that

all railroad companies in this State shall, at their terminus or any intermediate point, switch off and deliver to the connecting road having the same gauge all cars passing over their lines or any portion of the same, containing goods or freights consigned to any point over or beyond such connecting road (§719(q)); and that as the defendant carried these cars over a portion of its line to the connecting line of the Brunswick & Western at Albany, it was compelled by this clause of the statute to deliver ~~them~~ to latter railroad, to be forwarded to Brunswick. If the ~~defendant~~ had made a contract of this kind with the plaintiffs, and ~~had~~ failed to carry it out, it would have been liable in damages; but as it steadily refused to make this sort of contract, we do not think it is liable. Nor do we think that the words above quoted compelled the defendant to deliver its own cars to the connecting line to be forwarded over that line to Brunswick, when it had steadily refused to contract so to do. We are inclined to think that these words mean that if the railroad company receives cars from another line consigned to a point beyond its terminus, it is required to deliver them to the connecting road which runs to the point to which the cars are consigned; but it certainly was not the intention of the legislature to compel one railroad to furnish its own cars to another railroad without any compensation for their use by the other. If the contention of counsel for the plaintiffs in error is correct, a shipper at East Point on the Central railroad, which is six miles from Atlanta, the latter being the connecting point of the Central and the Georgia Pacific railroads, could load a car at East Point and consign it to Columbus, Mississippi, to be carried over the Georgia Pacific; and although the Central would haul the car only six miles, it would be compelled to deliver its own car to the Georgia Pacific to be hauled by the latter four or five hundred miles,

and would at the same time be held liable on its through bill of lading for all damages which might arise in the transportation and during the possession of the car by the Georgia Pacific. It would receive no compensation for the use of the car by the Georgia Pacific, except the carriage for six miles, and would run the risk of the loss of the car or any damage it might sustain while in the possession of the Georgia Pacific, for the latter might be insolvent. The legislature certainly never intended that the act should have this effect.

Nor does the allegation in the declaration that the defendant did ship cars through from Macon *via* Albany to Brunswick, help to sustain the contention of the plaintiffs. That, so far as appears, was a voluntary act upon its part. A corporation may voluntarily make a contract of this sort, but there is no law that we know of which compels it to make one against its wishes. And speaking for myself, I doubt very much the power of the legislature to enact a law compelling a railroad to make a contract for a through bill of lading beyond its terminus. Moreover, it appears from the allegations in this declaration that the defendant did make a contract with the plaintiffs to send their cotton to Albany, and the plaintiffs accepted that contract. They now seek to hold the defendant liable because it refused to do more than it agreed to do.

We think the trial judge was right in sustaining the demurrer and dismissing the case, and the judgment is

*Affirmed.*

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BOLES v. THE STATE.

To violate the statute (Code, §4527) forbidding the carrying of a pistol concealed on the person, it is not necessary for the weapon to be concealed in the clothing of the person; but the same result is accomplished by carrying it in a basket or bag upon the arm and not for transportation alone.

November 26, 1890.

86	255
94	774
86	255
105	635
86	255
126	89



Carrying concealed weapons. Criminal law. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

GEO. W. OWENS, by J. R. SAUSSY, for plaintiff in error.

W. W. FRASER, solicitor-general, by S. B. ADAMS, *contra*.

SIMMONS, Justice.

Boles was indicted and tried for the offence of carrying concealed weapons, and was convicted. The proof was, in substance, that the constable heard a pistol fire, and went to see who had shot it. He met the defendant and asked who had shot the pistol; the defendant denied having done so, and said it was shot by parties further down the road. The witness searched for the parties down the road and could not find them. He then charged the defendant with having fired the pistol. He again denied it and said the witness might search him. The witness did so, and found cartridges in his pocket, but did not find any pistol on his person. He had a basket on his arm, and on opening it Green found the pistol in it. The basket was about a foot wide and two feet long, and had a cover to it. Another witness swore he was present when the constable arrested the defendant, and found the pistol. It was in his basket and the basket was on his arm.

The only question to be decided in this case is whether, under the facts above given, the defendant was guilty of violating section 4527 of the code, which is as follows: "Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman's pistol), . . . shall be guilty of a misdemeanor," etc. The defendant, among other things, requested the court to charge that "unless the jury found that the defendant had the pistol

concealed on his person, he was not guilty of the offence charged"; and that "carrying a pistol in a basket on one's arm is not carrying a concealed weapon about one's person within the meaning of the statute." These requests the court refused to give, and in lieu thereof charged as follows: "If the jury believe that the pistol was carried in the basket by the defendant for convenience of use and access, and to evade the law, he would be guilty as charged. The question for the jury to determine is, whether the pistol was carried in the basket for the purpose of transportation or not: if it was carried for transportation, the defendant is not guilty as charged; if not carried for transportation, he is guilty." This charge, and the refusal to charge as requested to, is excepted to by the defendant.

We do not think the court erred in his refusal to give in charge the defendant's request, nor in charging as complained of. The charge given was as favorable to the defendant as he had any right to demand. We do not think that, in order to violate the above section of the code, it is necessary for the weapon to be concealed in the clothing of the person; if carried in a basket or bag upon his arm, not for the purpose of transportation alone, it would be a violation of the statute. See *State v. McManus*, 89 N. C. 555; 3 Am. & Eng. Enc. of L. 410; 2 Whart. Crim. L. §1557. *Judgment affirmed.*

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GRIFFIN v. THE STATE.

1. Grounds for new trial complaining of the admission of testimony must state the objection which was made when the testimony was offered, in order to be considered by this court.
2. The accused being a coal-heaver on a steamship at the time of the alleged larceny of certain goods therefrom, and goods of this character having been found in his possession and shown to have been taken from a box before the same left the vessel, testimony as to a confession by him of larcenies of goods from the steamship company at various times was not open to the objection that such confession was too general for proof of the special offence charged.

v 86-17

86	257
120	508

3. Complaint of the admission of testimony as to a confession because it was induced by promises of the person to whom it was made, should show what the confession was, that this court may judge of its materiality.
4. For the court to charge that if the larceny was committed at a certain time and place and the goods stolen were afterwards found in the possession of the accused, such facts would "raise the presumption under the law of the prisoner's guilt, and it is incumbent on the prisoner, the goods stolen having been found in his possession, to explain that possession to the satisfaction of the jury," or that if the goods were found in his possession and such possession is left unexplained, "the law raises the presumption from that possession that he committed the larceny," is error, but does not require a new trial where the verdict is demanded by the evidence.
5. A charge of the court excepted to must all be erroneous, where it states independent propositions, to avail the plaintiff in error.
6. Requests to charge which are fully covered by the general charge as given, may be denied.

December 1, 1890.

Larceny. Criminal law. Practice. Evidence. Confessions. Charge of court. Before Judge FALLIGANT. Chatham superior court. June term, 1890.

Reported in the decision.

GEORGE W. OWENS, by J. R. SAUSSY, for plaintiff in error.

W. W. FRASER, solicitor-general, by E. S. ELLIOTT, *contra*.

BLANDFORD, Justice.

The plaintiff in error was indicted and found guilty of larceny, in that he was charged with taking and carrying away from a vessel belonging to the Ocean Steamship Company, while in the port of Savannah, certain personal property. He moved for a new trial which was overruled by the court, and he excepted.

The first assignment of error in the motion for a new trial is, because the court allowed McDermot to testify as to an alleged confession made by defendant of larcenies committed at various times from the Ocean Steamship Company. It is manifest that in this ground

of the motion for a new trial no ground of objection is stated as to the admission of this evidence.

The second ground of the motion is, because McDermot was allowed to testify as to an alleged confession made by defendant to Ganey in the presence of McDermot. It is not stated in this ground, however, that objection to this evidence was made in the court below.

It is alleged in the bill of exceptions that the court committed error in allowing McDermot, a witness for the State, to testify as to an alleged confession made by the defendant of larcenies of goods committed at various times from the Ocean Steamship Company, admitting said confession in evidence over objection of defendant's counsel, the objection being that general confessions of general offences are not admissible in evidence and should not be allowed to prove, or tend to prove, a special offence. The bill of exceptions does not clearly show, however, that the grounds of the objection were urged at the time and before the court admitted this evidence; nor is the same shown in the motion for a new trial. But admitting that the objections were properly made and urged at the time and before the admission of this evidence, we see no error in admitting the same, because it is shown by the record that the particular larceny for which the accused was indicted consisted of the taking of certain goods from the steamship "City of Augusta," and that goods of the character found in defendant's possession were upon this vessel at the time the larceny is alleged to have been committed. And it is further shown by the evidence that the accused was a coal-heaver upon the vessel at that time; that goods of the kind stolen were on the vessel at the time; that subsequently a box of such goods transported upon this steamship was received by Mohr Bros., the consignees, and upon being opened, it

was discovered that goods similar to those admitted by the confession of the accused to have been stolen by him were missing from this box. It was further shown, by the drayman who hauled the goods from the wharf to Mohr Bros., that the box was not opened while in his possession; and it was also shown that when the box was taken from the vessel and placed upon the wharf, there was a watchman placed over the same, and no one could have taken the goods without being seen, and no one did take them while there. So we think the court did right to admit this evidence.

It is furthermore alleged as error that the court allowed the witness McDermot to testify to an alleged confession made by the defendant to one Ganey, in the presence of the witness, over defendant's objection. What the objection urged at the time was, is not shown in the motion for new trial; but it is alleged in the bill of exceptions that the error was, because said confession was induced by promises made by said Ganey to the defendant. The record does not show what these confessions were which the court admitted in evidence—whether they were material or immaterial. It is simply alleged in the bill of exceptions that it was error because the confessions were induced by promises made by Ganey to the defendant; so we decline to pass upon the question made in this assignment of error, as we cannot determine from the record whether the accused was hurt thereby.

In the eighth ground it is complained that the court erred in charging the jury that if they found that the crime of larceny was committed on the vessel on that day, and the goods taken therefrom were afterwards found in the possession of the prisoner, such facts would "raise the presumption under the law of the prisoner's guilt, and it is incumbent on the prisoner, the goods stolen having been found in his possession, to explain that possession to the satisfaction

of the jury." We are not well satisfied with this charge. If it was the meaning of the court to state to the jury that when the crime of larceny had been proved and the goods stolen were found shortly thereafter in the possession of the prisoner, the law would then authorize the jury to presume the prisoner guilty, such charge would not be error. But we think this court laid down the correct doctrine, as applicable to cases of this sort, in the case of *Fulvey v. State*, 85 Ga. 157, wherein it was held that, where stolen goods are found in the possession of a defendant charged with burglary, shortly after the commission of the offence, such fact would authorize the jury to infer that the accused was guilty unless he explained the possession to their satisfaction. In the case of *Hill v. State*, 63 Ga. 578, this question was discussed by BLECKLEY, J., to some extent, and it was there said: "There is a wide difference between resting the result of a trial upon facts which legally constitute the offence charged, and making it turn upon other facts which are merely evidence of the constituent facts." Where the facts proved constitute the offence charged in the indictment, then it would be proper for the court to instruct the jury that if they believed such facts, they should convict the defendant. See *Parker v. State*, 34 Ga. 262; *Tucker v. State*, 57 *Ib.* 503. The presumption in such a case is not one of law, but of fact. 1 Whar. Cr. L. §729; 3 Greenlf. Ev. §31; *Hall v. State*, 8 Ind. 439; *State v. Hodge*, 50 N. H. 510; *Stover v. People*, 56 N. Y. 315; *Graves v. State*, 12 Wis. 591; *Crilley v. State*, 20 *Ib.* 231. We think the case of *Hill v. State*, *supra*, fully sustains the view we have stated, and is the law of this State upon the subject.

The ninth ground excepts to a certain charge given by the court. A portion of the charge excepted to is correct law, while part of the same is not sound. This

court has frequently held, however, that a charge of a court excepted to must be all of it erroneous, where it states independent propositions, in order to avail the party making the exception anything. We find that the court in this charge instructed the jury that if the goods were found in the defendant's possession, and such possession was left unexplained, "the law raises the presumption from that possession that he committed the larceny." We think the latter part of this charge is clearly error under the former rulings of this court; and if this were a close case upon the facts, we would unhesitatingly reverse the judgment and remand the case for further trial. But we are satisfied, from looking into the evidence in this case, that the verdict of the jury was demanded by the proof submitted.

We find no error in the other charges of the court excepted to, nor do we think it was error for the judge to refuse to give in charge the requests asked by counsel for the accused, inasmuch as we find, in looking at the entire charge of the court, that the requests of the plaintiff in error were fully covered by the general charge to the jury.

*Judgment affirmed.*

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McNALLY v. THE SAVANNAH, FLORIDA AND WESTERN  
RAILWAY COMPANY, and *vice versa*.

The servant of a railroad company who is injured by a rare and peculiar accident, such as being struck in the eye by a flake of iron knocked from a swage worked on by other servants and shown to have been in average condition, cannot recover damages from the company for such injury, his place of labor being elsewhere than at the place where the swage was located, but his call there being to procure a bolt needed in his department.

December 1, 1890.

Negligence. Railroads. Master and servant. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

DENMARK, ADAMS & ADAMS, for plaintiff.

CHISHOLM, ERWIN & DUBIGNON, for defendant.

BLANDFORD, Justice.

The plaintiff in error brought his action against the defendant in error for damages on account of an injury which he alleged he received in consequence of the company's negligence in not furnishing a safe and proper tool, called a swage, to be used by its workmen, the said swage having been used for such a length of time that it had become battered and burred, by reason of which defect a flake of iron was knocked off of the same and struck him in the eye, whereby he was injured. He was an employee of the defendant company, as well as those operating with the swage, but his place of labor was elsewhere, his call at the shop being to procure a bolt which was needed in his department of work. He recovered a verdict in the court below; the defendant moved the court for a new trial upon several grounds, which was granted; and plaintiff filed his bill of exceptions to the grant of a new trial and says the same was error.

We have carefully examined the evidence in this record, and are satisfied that the injury to the plaintiff was the result of a mere accident—a thing not reasonably to be expected—a rare and peculiar accident. The implement is by the evidence shown to have been in average condition. It is true there is a witness who testifies that the implement, in the condition in which it was, was not proper for use and should have been repaired; but the company had discharged its duty to the public or mere visitors to the shop, by keeping the tool in average condition. Most tools are in some degree dangerous. So we think, upon considering all the evidence in the case, that the court should have granted a new trial, as



it did, and should continue to do so unless the case is strengthened by additional evidence.

The cross-bill of exceptions is dismissed, and the judgment of the court below granting a new trial is

*Affirmed.*

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LEE *et al.* v. ARNSDORFF.

86 264  
108 209

A petition by the defendant in judgment for injunction against its enforcement, on the ground that it was obtained by fraud in that, before it was rendered, he was prevented from appearing and defending the action by the statement of the plaintiff's counsel that the case would be dismissed, whereupon defendant called the attention of the justice in whose court the action was pending, who assured him that he might rely on the statement made by the plaintiff's counsel, was good on demurrer. But where it appeared from the petitioner's own testimony that he had not been told that the case would be dismissed, though he so thought from what the counsel said, which was, that the case would not be tried at the next term of the justice's court because counsel had business elsewhere, the allegation was not established.

- (a) If the judgment was never entered on the docket of the justice's court, the remedy of the petitioner would not have been by injunction or petition in the nature of a bill in equity. Whether or not the judgment could have been so entered *nunc pro tunc*, query.

December 1, 1890.

Judgments. Fraud. Justices' courts. Before Judge FALLIGANT. Effingham superior court. May term, 1890.

Reported in the decision.

H. B. STRANGE and D. H. CLARK, for plaintiffs in error.

A. C. WRIGHT, *contra*.

BLANDFORD, Justice.

~~This was a petition~~ filed by the defendant in error against the plaintiffs in error, ~~praying an injunction~~, and also praying that a certain judgment rendered in ~~a~~ justice's court against him in favor of the plaintiffs in error be set aside and a perpetual injunction granted to prevent the plaintiffs in error from enforcing a certain execu-

tion issued upon said judgment. The ground stated in the petition is that the judgment was obtained by fraud, in that the defendant in error, while the case was pending and before judgment, was prevented from appearing and defending the action by reason of the fraud on the part of Lee and his counsel in stating to him that the case would be dismissed, whereupon he called the attention of the justice of the peace to the matter, who assured him that he might rely upon said statements made to him by counsel for Lee. The parties went to trial upon the petition and answers, and the petitioner himself testified substantially that neither Lee, his counsel nor the justice of the peace had ever actually assured him that the case would be dismissed, but he thought it would be dismissed from what Strange said; but that the case was ready for trial at the April term, 1889, of the justice's court, and that counsel for Lee (who was the plaintiff in the justice's court) said to him the case would not be tried at the April term as he had some important business to attend to in an adjoining county; that he (petitioner) agreed to this, and that thereafter a judgment was rendered against him by the justice of the peace at the instance of the plaintiff, which judgment was dated the 4th of April. The evidence offered by the plaintiffs in error showed that while the judgment was dated April 4th, it was in fact rendered at the May term of the court, at which term the defendant in error was not present and did not appear to defend the suit. The judgment was entered upon the summons issued by the justice, but not upon the docket of the court. Section 457 of the code provides that justices of the peace have authority, and it is their duty, to keep a docket of all causes brought before them, in which must be entered the names of the parties, the returns of the officer, and the entry of the judgment, specifying its amount and the

day of its rendition. See 64 Ga. 566, 567. If this judgment had never been entered upon the docket of the justice of the peace (the place where it should have been entered), then the remedy of the defendant in error would not have been injunction, or a petition in the nature of a bill in equity. We do not say whether the judgment could have been entered *nunc pro tunc* or not, as that point is not before us. The verdict of the jury finding in favor of the defendant in error was unwarranted by the law and the evidence in the case, and it was the duty of the court to have granted a new trial as asked for by the plaintiffs in error, as, in our opinion, there should have been no recovery in his behalf. We think, however, under the allegations in the petition, that the court did right to overrule the demurrer to the petition; but the evidence of the defendant in error makes an entirely different case from the allegations in his petition. Indeed, his own evidence makes no case for a recovery by him.

*The judgment is reversed.*

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LOGAN v. THE STATE.

A defendant in a misdemeanor case can waive trial by jury, whether the same be upon accusation drawn by the prosecuting officer or upon indictment, and can do so in the city court of Savannah. And where the waiver was entered upon a printed form in the words, "The defendant, . . . being in open court, waives arraignment and a trial by jury, pleads not guilty and puts himself upon the country," and through inadvertence the last five words were not erased, they became surplusage and meaningless, and did not vitiate the waiver. The defendant, having voluntarily entered into the same, and having been convicted by the judge, is estopped from calling it in question.

December 1, 1890.

Criminal law. Practice. Waiver. Estoppel. Trials. Before Judge HARDEN. City court of Savannah. May term, 1890.

86 266  
88 735  
86 266  
124 30

Reported in the decision.

T. S. MORGAN, Jr., for plaintiff in error.

W. W. FRASER, solicitor-general, by S. B. ADAMS,  
*contra*.

SIMMONS, Justice.

Logan was indicted and tried for the offence of assault and battery, and was convicted. He made a motion for a new trial upon numerous grounds, which was overruled by the court, and he excepted. It appears from the record that he was indicted by the grand jury of the city court of Savannah, and that when the case was called finally for trial, he waived a trial by jury and consented to be tried by the judge of that court. Pending the trial the defendant moved to withdraw his waiver of jury trial, and demanded to be tried by a jury, but the court overruled the motion and proceeded with the trial. It was contended by counsel for the defendant that he had the right to withdraw his consent to be tried by the court, because there was not a full waiver of trial by jury, the language of the waiver being as follows :

“The defendant, Hugh Logan, being in open court, waives arraignment and a trial by jury, pleads not guilty and puts himself upon the country.

(Signed) T. S. MORGAN, att’y for defendant.”

It was contended that “in law this was no waiver of trial by jury, it being contradictory in its terms; that while in one part it waives trial by jury, in another it demands a jury, the words ‘puts himself upon the country’ being equivalent in law to putting himself for trial upon a jury.” We think that when the defendant appeared in court, entered into this waiver, and consented to be tried by the judge and proceeded to trial before him without a jury, he thereby consented to be tried without a jury; and the words “puts himself upon the country” were surplusage or meaningless, especially as

it appears from a note by the judge who tried the case that the waiver of trial by jury was written upon a printed form which contained these words, and the solicitor-general through inadvertence had failed to erase them.

The controlling question, however, in the case, is whether a defendant in a misdemeanor case can waive trial by jury in this State. The trial judge held that the defendant could do so, and had done so, in this case; and we think the ruling was correct. Whatever may be the decisions in other States as to the right to waive trial by jury in cases of misdemeanor, we do not think there can be any doubt that the defendant had this right under our law. Our code declares (§10) that "a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest." The waiver in this case did not injure others, nor did it affect the public interest. The legislature in various acts establishing city and county courts has provided for waiver of trial by jury in misdemeanor cases; and these acts are declarations upon the part of the legislature that such waiver does not affect the public interest or contravene public policy. The act establishing the city court of Savannah, in which this defendant was tried, authorizes the judge thereof to "hear and determine the case of any person charged with the commission of any criminal offence within the jurisdiction of said court, upon accusation drawn up by the prosecuting officer, without a jury: provided the person accused shall in open court waive indictment or presentment by a grand jury, and arraignment and trial by a petit jury," etc. Code, §4917.

It was argued that this statute provides merely for cases where the trial is upon an accusation drawn up by the prosecuting officer, and not for cases tried upon an indictment preferred by the grand jury, as was done

in this case. But it is immaterial whether this statute provided for the waiver in this case or not, for as we have already shown, the general law as to waiver, independently of this statute, was sufficient to authorize the waiver. It authorizes, as we have seen, every waiver except such as may "injure others or affect the public interest," or in other words, contravene public policy. And this special statute itself is an expression by the legislature that the public interest is not affected nor public policy contravened by waiver of jury trial and by trial without a jury by the judge of the city court of Savannah in cases of this grade. Nor is the force of this statute as an expression of public policy impaired by the fact that it fails to provide for waiver where the charge is not made by accusation, but by indictment, as in this case. We know of no consideration of public policy which renders a jury more imperatively demanded by the public interest and the judge less competent to pass upon the issue when the offence is charged by indictment, than when the same offence is charged by an accusation. Where the right to waive jury trial is denied upon the ground of public policy, it is because trial by jury is regarded as the only proper mode for the trial of the offence, and as essential to the public interest, but it is clear from this statute that the legislature of this State regarded trial by the judge of the city court of Savannah, without a jury, as a proper mode for the trial of the offence charged against this defendant, and as not opposed to the public interest.

Authority is abundant in other States to the effect that public policy is not contravened by statutes authorizing waiver of jury trial in offences of this grade; and there is no reason to suppose that public policy in this State is more restricted on the subject. Indeed, interpreting that policy by the absence of any restriction in our constitution or law, upon the right to waive trial by

jury, and by the existence of various statutes which recognize this right as to the courts which they create, and by the language of this court in the past, we see no consideration of public policy which would exclude the waiver in this case from the broad provisions of our own statute as to waivers generally. This court has gone so far as to say, "We lay down the broad proposition that a prisoner may waive even a trial itself, and be capitally punished upon his own confession of guilt; he may waive any minor right or privilege." LUMPKIN, J., in *Sarah v. The State*, 28 Ga. 581. There is no reason why a prisoner in a case of this kind should not have the right to be tried by a conscientious and intelligent judge, if he prefers it, as well as the right to be tried by a jury. There may be reasons, indeed, why he should prefer the former to the latter, especially as it may often conduce to the speedy trial which it is the policy of the law to accord him.

The defendant in this case knew that he had the right to be tried by a jury, but he chose to "waive or renounce what the law had established in his favor." He appeared in court and voluntarily waived it, and agreed to be tried by the court without a jury, and acted upon his waiver and consent by proceeding to trial. After the trial had proceeded somewhat, and when he probably saw that he was likely to be convicted under the evidence, he sought to undo his own act and withdraw his consent; and after conviction, insisted that he had no right to give his consent. We think he did have the right, and having thereby given to the court which had jurisdiction of his case, jurisdiction also to try him without a jury, he is estopped after conviction from calling it in question. Not only was his consent freely and voluntarily given, but, as appears from the record, he urged upon the court to try him without a jury, even after the judge had expressed his

desire and request to be released from that duty. Upon the subject of waiver, see *Cunningham v. The State*, 80 Ga. 4.

There are other grounds in the motion for a new trial, some of them not properly approved by the court, and others immaterial in the view we take of the case; and we think it unnecessary to discuss them further than to say that the evidence was sufficient to authorize the judgment.

*Judgment affirmed.*

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McALPIN v. PURSE *et al.*

The affidavit and the summons issued thereupon by the magistrate under the code, §4085 *et seq.*, are sufficient if they allege that at a certain time the defendant forcibly entered upon the land described, of which the plaintiff was in possession, and forcibly detained said land from him; and need not describe the manner, means or nature of the force used.

December 1, 1890.

Forcible entry and detainer. Before Judge FALLIGANT.  
Chatham superior court. June term, 1890.

Reported in the decision.

C. N. WEST, by S. B. ADAMS, for plaintiff.

J. R. SAUSSY, for defendants.

SIMMONS, Justice.

McAlpin appeared before a magistrate and made oath as follows: On February 6, 1890, he was in possession of lots of land lying in the fifth district G. M. of said county, the lots being known as wharf lots 4, 13, 14 and 16 New Deptford. Being so in possession of these lots, D. G. Purse and J. C. Rowland, both of Chatham county, did then and there forcibly enter upon the said lots of land and did eject him therefrom. The deponent also says that on the 6th day of February, 1890, he was in possession of the lots of land (describing them as above), and being so in possession of them,

86	271
109	572



D. G. Purse and J. C. Rowland, both of Chatham county, then and there forcibly detained from him the lands of which he was in possession. Wherefore he prayed that a summons be issued, requiring Purse and Rowland to appear on the 17th day of March, 1890, before the justice of the peace for said fifth district (naming him), and defend the charges of forcible entry and forcible detainer alleged against them by the deponent.

Upon this affidavit the justice of the peace issued a summons directed to Purse and Rowland, reciting the facts in the affidavit, and requiring them to appear before him at his office and defend the charges against them of forcible entry and forcible detainer. When the case came on for a hearing before the magistrate, the warrant and affidavit, upon motion of the defendants, were dismissed as being insufficient in law. McAlpin took the case by *certiorari* to the superior court, alleging that it was error so to dismiss the affidavit and warrant. The judge of the superior court sustained the decision of the court below, and McAlpin excepted.

It seems that the judge held this affidavit to be insufficient in law because it did not assert that the forcible entry was made "by violently taking possession of lands and tenements with menaces, force and arms, and without authority of law," and because it did not assert that the land was forcibly detained in the same manner. In other words, that the affidavit was deficient because it did not follow the definitions of forcible entry and detainer as laid down in the code. We differ from the learned judge in the court below, and think this affidavit was sufficient to authorize the magistrate and a jury to hear and determine the case. In our opinion, it is unnecessary in a proceeding under this statute to describe in the affidavit or the warrant

the manner or means of the forcible entry or the forcible detainer. We think the use of these words, "forcible entry" and "forcible detainer," is sufficient to put the defendant upon notice of the nature and character of the action brought against him, so that he may properly prepare his defence, when he is served with a summons requiring him to appear and defend the charges alleged against him by the deponent. If a criminal warrant had been sued out against the defendants, under our code, §§4714, 4715, it would scarcely be doubted that an affidavit charging a forcible entry and forcible detainer of the deponent's lands would have been sufficient. Under these sections, it is only necessary to name the offence committed by the defendant, in the affidavit and warrant, and it is not necessary to set out the facts which constitute the offence. Under these sections, an affidavit charging that a defendant committed the crime of murder, would be sufficient upon which to authorize a magistrate to issue a warrant; and under section 4716, it is only necessary for the magistrate, when he issues the warrant, to name the offence therein. If, therefore, McAlpin had sued out a criminal warrant and made affidavit that these defendants had committed the offence of "forcible entry and forcible detainer," it would have been sufficient to authorize the magistrate to hear the case and bind the defendants over, if the evidence warranted it. If this would have been sufficient in a criminal case, why is it not sufficient in a civil case? In a criminal case the prosecutor would have had to prove the mode and manner of the forcible entry and detainer. He would have had to prove that the defendant violently took possession of the land with menaces or with force and arms and without authority of law, and the defendant could have justified himself by disproving these charges. In a civil case it would be necessary for the

plaintiff to prove the same things, and the defendant could make the same defence ; and he would be just as well prepared to make the defence in a civil proceeding as he would be in a criminal proceeding. It being unnecessary, therefore, in a criminal proceeding to set out in the affidavit and warrant the mode and manner of committing the offence, we do not think it is necessary in a civil proceeding to set them out ; especially as the only facts the jury can inquire into upon the trial are the possession and the force. Code, §4087. These being the only facts which could be inquired into in this case, the defendants were certainly put upon notice of what they were called upon to answer when served with a warrant charging them with forcible entry and forcible detainer. The warrant notified them that they were charged with taking possession of the plaintiff's land described in the affidavit and warrant, by force, and detaining the same by force ; and in our opinion, it was unnecessary to go further and set out in the affidavit or the warrant the nature of the force used, whether it was violence or threats or menaces.

*Judgment reversed.*

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BROWN v. SMITH & KELLY.

For an injury inflicted by the negligence of the servant of the defendants in the performance of work for which he was hired by them to another who has complete control and direction of him for the occasion, the defendants having no such control, though receiving payment for the work performed by him, and the person to whom he is hired having the exclusive right to discharge him and put another in his place or to put him about other work, there is no liability on the defendants ; he being, for the time, not their servant but that of the hirer.

December 1, 1890.

Negligence. Master and servant. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

LESTER & RAVENEL, for plaintiff.

O'CONNOR & O'BYRNE, for defendants.

SIMMONS, Justice.

Brown sued Smith & Kelly for damages, alleging in substance that he was engaged as a laborer in discharging a vessel laden with coal lying at the wharf of C. H. Dixon, in Savannah; that it was his duty to remain in the hold of the vessel to receive empty tubs as they were lowered into the hold, and to unhook them from the hoisting rope, and hook thereon full tubs to be hoisted therefrom; that there was also then and there employed in discharging the vessel a certain pair of mules, the property of said Smith & Kelly, managed and controlled by their servant, these mules being attached to a rope used in hoisting the coal, and being driven by said servant of the defendants; that during the discharging of the vessel, it was the duty of this servant, as an empty tub was loaded into the vessel, to keep the mules stationary while the plaintiff unhooked the empty tub from the rope and hitched thereto a full tub, and not to drive the mules off or permit them to walk off until satisfied that the plaintiff had finished the hooking and unhooking; that an empty tub had been lowered into the hold, and while he was engaged in unhooking it from the rope and before he had finished doing so, the driver of the mules, without any signal so to do, negligently and carelessly permitted the mules to walk off, jerking the empty tub against the petitioner's hand, catching the hand between the tub and the side of the hatchway, and crushing and mashing it so as to make it necessary to amputate the third finger, depriving him of the use of his hand and causing him to lose time and money, etc., and giving him great pain. The jury returned a verdict in favor of the defendants, and the plaintiff moved for a new trial, which was refused, the court holding that under the evidence the plaintiff was not

entitled to recover, because the driver of the mules was not the servant of the defendants, but the servant of Dixon. The evidence on this point in substance was, that Dixon had a vessel loaded with coal, and employed Brown, the plaintiff, to assist in unloading it, and hired from Smith & Kelly a pair of mules and a driver. The mules were to be hitched to a rope, and by this means were to pull the tubs of coal out of the hold upon the dock. Although Dixon hired the mules and driver from Smith & Kelly, he had full control of both; they were under his control and direction during the time the work of unloading the coal was in progress, and when the driver was not driving the mules, Dixon had the right to put him at any other work in and about the vessel. And although he did not pay the driver for his work, but paid Smith & Kelly for the hire of the mules and the driver, he nevertheless had the right, under the contract with Smith & Kelly, to discharge the driver and appoint a substitute in his place if the driver was careless or incompetent. Smith & Kelly had no right to give any directions to the driver while in the service of Dixon, nor to control him in any manner during that time, but he was to be under the absolute control of Dixon during the progress of the work.

Under this state of facts, we think the court was right in holding that the driver of the mules was not the servant of Smith & Kelly in that particular work, and that the plaintiff could not recover from them. While it is true that the driver of the mules may have been the general servant of Smith & Kelly, yet when they hired him to Dixon for this particular work, and gave Dixon control over him, and the right to discharge him if Dixon found it necessary, the driver became the special servant of Dixon for that occasion, and Smith & Kelly would not be liable for his negligent acts while thus in the employment of Dixon. Wood, in his work

on Master & Servant, §317, says: "The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time when the injury was inflicted he was subject to such person's orders and control, and was liable to be discharged by him for disobedience of orders or misconduct." In Whittaker's *Smith on Negligence*, p. 165, it is said: "Where a master allows his servant to be hired by another, he remains liable to the hirer and to strangers for negligence of such servant; and even where that other himself selects the servants, although the master might not be liable for mere incompetency, yet he would be so for negligence. If the master abandons all control over the servant and all right to discharge him, and these rights are taken by the hirer, of course the servant becomes the servant of the hirer."

In *Sherman & Redfield on Negligence*, §162, it is said: "If the hirer is vested for the time with the exclusive right to discharge the servants and employ others, he alone is responsible for their defaults."

We have seen from the evidence above quoted that Dixon had the exclusive right to discharge this driver and employ another in his place. He had the right absolutely to control and direct the driver. He had the right to take him from the mules and put him at other work. In other words, he had as ample and complete control over the driver as if he had originally hired him. We think, therefore, that under these authorities and others which will be cited, when Brown was injured by the carelessness of the driver, the driver was not the servant of Smith & Kelly, but the servant of Dixon. *Macdonell on Master & Servant*, p. 307 *et seq.*; *Laughter v. Pointer*, 5 Barn. & Cress. 547; *Murphey v. Caralli*, 3 Exch. 461; *Kimball v. Cushman*, 103 Mass. 194; *Vary v. Railroad Co.*, 42 Iowa, 246. *Judgment affirmed.*

## THE OCEAN STEAMSHIP COMPANY v. CHEENEY.

A steamship company is not liable in damages for an injury to its laborer employed in stowing cotton in the hold of its vessel, by a bale of cotton thrown down the hatchway, where the injury is caused by the failure of the hatch-tender (who is usually the engine-driver or is taken indifferently from the laborers employed in loading the vessel) to give warning of the approach of the falling bale, whether it be thrown when the hatch-tender is present and fails to give the warning, or, while he is absent, it be thrown without notice by another servant engaged in the same business. In either case the injury is occasioned by the negligence of a fellow-servant.

December 1, 1890.

Negligence. Master and servant. Before Judge HARDEN. City court of Savannah. July term, 1890.

Action by Cheeney against the steamship company for damages, alleging that he was employed by it to stow cotton in the hold of its ship; that it was the company's duty to give notice at the hatchway whenever a bale of cotton was thrown into the hold, so that persons engaged in stowing the cotton below might get out of the way of the falling bale and avoid injury to themselves, but at the time in question the company did not give such warning, and the bale was thrown down without notice to plaintiff, and it struck him and inflicted permanent injuries; that he was acting with due care and caution; that the company had always kept a man stationed at the hatchway, as was its duty, to give warning whenever a bale of cotton was thrown down, but on this occasion it did not have and keep a man so stationed and did not cause any notice or caution to be given when the bale was thrown down, and was thus guilty of gross negligence and indifference to the safety of its employees; and that the injury was caused by the negligence of the company in causing the bale to be thrown down the hatchway into the hold, instead of having it properly lowered by the proper tackle

86	278
92	727
86	278
495	381
86	278
118	654
118	677

usually used for such purposes, without giving any notice or warning when the bale was so thrown.

The testimony for the plaintiff tended to show as follows: He was employed by the defendant and was in the forward-hold of its ship, stowing cotton, about ten feet from the hatch. He had a bale of cotton on his knees, and was in the act of moving it when another bale was thrown down from the upper deck without warning, and struck him, inflicting the injuries complained of. The proper and usual way to put the cotton into the hold was to lower it with hooks, though it was not uncommon for it to be thrown down, especially when they were in a hurry to load the vessel, but the custom was, when it was thrown down, to have a signal given both from above and below, so that the men who were at work below would be on their guard, and also, when the cotton was thrown down, to have a hatch-tender on the upper deck to throw it down or superintend it. Sometimes the wild truckmen would rush on the vessel with cotton and throw it down if no one were minding the hatch. Some cotton had been thrown down before the plaintiff was hurt, and he and other hands were engaged in stowing it when the bale in question was thrown without warning. Five bales were generally lowered, and then it was the custom to begin to throw bales down when the gang below asked for them, and to give warning before they were thrown. About five bales had been thrown down, and then they stopped throwing, and the gang below started to moving them, and the first one that was thrown down after this was the one which struck the plaintiff. In throwing down the previous lot warning had been given. The donkey-engine was at the hatch and had steam on, and could have been used for lowering the cotton, but this was not done. The plaintiff had been at work in the after-hold stowing rosin, and



truckmen were throwing cotton down the hold when he and other hands went there from the after-hold; the gang had to wait until the trucks had ceased, and it was when the truckmen went off to get more cotton that plaintiff and others went down the hold and commenced stowing the cotton which had been thrown down, and before they got through stowing it the trucks came in again, and the first bale that was thrown down was the one that hit him. He had no notice that they were going to throw any this time, nor had notice been given from the bottom for cotton to be thrown down, as was usual and as should have been done before any was thrown. There is generally a man at the hatch, called a hatch-tender, to sing out to the men at work in the hold when cotton was going to come down; but none was there at this time. When he came up at first, the men were throwing the cotton down, and no hatch-tender was there; if one had been there, the truckmen would not have been dumping the cotton, and plaintiff and his companions would not have had to wait before they went down into the hold. It did not occur to him that the next man who came up would dump the cotton down, but he thought there would be somebody there to have charge of it. The men were moved around on the shortest notice, the hatch-tender being generally a colored man who got the same pay as the members of the gang plaintiff belonged to; he was usually a man taken from the gang, but must know his business; the foreman generally put him there at the hatch, the foreman's duties being to superintend around and put the men at work and suit himself generally. When the truckers come up to the hatch and find no hatch-tender there, they always give the notice themselves when they are going to throw a bale down; they are not allowed to do it, but did it sometimes unless there was a foreman somewhere between

decks to see them and stop them, or put a man there as hatch-tender; if a foreman saw a set of trucks and a crowd of cotton, he appointed a man as hatch-tender and put the cotton off the trucks; sometimes there might be one or two trucks at the hatch before the man got there; the foreman would have to go out and get a man and send him there, because he could not take any man; the lives of all the men in the hold were in the hands of the man at the hatch; sometimes an incompetent man was put in as hatch-tender, and the men in the hold refused to work until another was put in that they were not afraid of.

Evidence for the defendant: The foreman of its stevedoring department was sometimes on the ship and sometimes on the wharf, his duties being to look after the stowing of the ship and see that the men attended to their duties. Ten or fifteen minutes before the plaintiff was hurt, the foreman was there and everything was going on all right, and there was then a man attending to the hatch, whose name the foreman did not remember. When the men in the hold wanted more cotton they sang out, "Heave her down," and the duty of the man at the hatch was, to give them more and sing out every time he heaved. He generally heaved several bales, singing out, "Stand clear," and after getting through, sang out, "Take them out," and when the men came to take them out he would stop. The hatch-tender should be a reliable man, and was generally the donkey-engine man when he was not engaged, and if he were busy, one of the wharf-hands who could sing out loud was taken; he had nothing else to do but to stand there and give warning. The foreman generally goes around and sees that some one is at the hatch. It is generally the custom on this steamer to truck the cotton in and throw it down, there being only one ship of the defendant on which it is lowered with

books on account of the smallness of its hatch and the depth of its holds. The cotton which was being thrown down ten or fifteen minutes before this accident occurred, was thrown down by the hatch-tender himself when the foreman was there, and the truckmen did not have anything to do with it. The foreman testified that the defendant always had a hatch-tender, always put one there and did not allow truckmen to throw the cotton down, under any circumstances, when men were below. He was not present when the accident occurred. Another witness testified that when the accident occurred, a man whose name was not remembered, was tending hatch, and witness was assisting him and shoving the cotton up to the hatch. The hatch-tender was singing out "under" when he threw the cotton down, all that day. Witness was positive the signal was given to throw down cotton, that he and the hatch-tender both called out to "stand from under," that three bales were thrown down, and that no bale of cotton was thrown while he was there without warning being given, and he was there when the plaintiff was hurt.

There was a verdict for the plaintiff; and a motion by the defendant for a new trial was overruled, and exceptions were taken.

LAWTON & CUNNINGHAM, for plaintiff in error.

J. R. SAUSSY, *contra*.

SIMMONS, Justice.

We think the court erred in not granting a new trial in this case. The evidence clearly shows that the company had placed a man at the hatchway to give notice to the hands below. The foreman testified that the hatch-tender was at the hatchway about fifteen minutes before the accident, and was in the discharge of his duty. Middleton, one of the plaintiff's witnesses, testified that there were some bales that came down before the one that hit Cheeney, and when they came, a warning was

given and all got out of the way and nobody was hurt. This shows that a person had been placed to attend the hatchway, and gave warning to those below; but it seems that no warning was given when the bale which hurt Cheeney was thrown down.

The hatch-tender was usually the engine-driver or one of the hands employed to assist in loading the vessel. It appears that no special person was designated for this service, but that the hatch-tender "was taken indifferently from the laborers." He was engaged by the company in the same business that all the other hands of the gang were engaged in, to wit, the loading of the vessel with freight. He was therefore a co-employee with the other persons engaged in this business; and if, when stationed at the hatchway for the purpose of giving notice to the hands below, he failed to give that notice, or if he absented himself from the hatchway, and while absent, some other person engaged in the business threw the bale down into the hold without notice to those below, and the plaintiff was thereby injured, it was in consequence of the negligence of a co-employee; and under the law he cannot recover for such negligence. We do not think it makes any difference whether the bale was thrown down when the hatch-tender was present and failed to give notice, or whether in his absence some other co-employee threw the bale down; in either case it would be the negligence of a co-employee. It would be the negligence of the hatch-tender in not giving notice, or in absenting himself from the hatchway; or in case it was done in the hatch-tender's absence, the negligence of some other co-employee in throwing the bale down without notice.

While this plaintiff seems to be a poor man and to have been dreadfully hurt, and while we sympathize with him greatly in his misfortune, we are compelled

under our sense of duty to hold that under this evidence the law does not entitle him to recover from this steamship company.

*Judgment reversed.*

HILL *et al.*, receivers, v. THE WESTERN AND ATLANTIC RAILROAD COMPANY; and the same v. THE GATE CITY NATIONAL BANK.

FALLIGANT, J.\*—1. Section 4429 of the code (Act of 1833) is a special statute of the State of Georgia with reference to banks, intended to prohibit preferences by a bank insolvent at the time or in contemplation of insolvency, which preferences might be legal in the case of other insolvent debtors under the act of 1818.

- (a) In order for the receivers to maintain these suits, it was not necessary, as a condition precedent, that the president, directors or other officers consenting to such fraudulent transfers of effects, etc., should first be prosecuted.
2. When an insolvent bank executes an assignment of "all and every of its property and effects, rights and credits of each and every kind and character whatsoever, in as full and complete a manner as the same are now owned, held and possessed by it," and the assignees accept the trust, the title of the property passes to the assignees, and the right to sue for and recover all rights, credits, etc.
3. When, upon the prayer of a creditors' bill, receivers of the court are appointed to receive, take and hold all the property and effects conveyed to said assignees by said deed of assignment, said receivers acquire all the rights of said assignees. If prior to said assignment the said bank, being insolvent or in contemplation of insolvency, has made any transfer of its effects in violation of section 4429, said transfer is fraudulent and void except as to *bona fide* purchasers without notice; and the effects so fraudulently transferred become a trust fund in the hands of the transferees, which may be recovered by the receivers upon proper action brought, it being within the power of a court of equity to authorize and direct such proceedings.
- (a) A depositor or other *bona fide* creditor who draws his check on such bank or receives effects therefrom without notice of or reason to suspect its insolvent condition, will be considered a *bona fide* purchaser under this act.
- (b) Under the general term "effects," the transfer of money, promissory notes or other securities, will be included.
4. The receivers were legally appointed, and, under the order of Judge Hood, were fully and properly authorized to institute and maintain these suits.

\*Presiding in place of BLECKLEY, C. J., disqualified.

5. Both of these causes are to be tried and controlled under the act of 1833 (Code, §4429), *supra*, and we think there is enough evidence in each case as to the insolvency of the bank and as to notice thereof on the part of the defendants at the time of the alleged transfer of its effects to them, to carry the cases to the jury, to be by them passed upon under the instructions of the court in pursuance of this decision.

The grant of nonsuit in both cases is

*Reversed.*

December 14, 1890.

Banks. Insolvency. Debtor and creditor. Statutes. Actions. Receivers. Officers. Assignments. Title. *Bona fides*. Trusts. Equity. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Hill and Thomson, as receivers of the Citizens' Bank of Georgia, brought separate actions against the railroad company for \$18,994.76, and the Gate City bank for \$17,303.79, alleging as follows: The Citizens' bank, on April 13, 1881, was doing a general banking business, and on and before that day was insolvent. It had numerous stockholders and creditors, two of its creditors being the defendants. On that day, and after its insolvency, it transferred and delivered of its effects to the railroad company \$18,994.76, and to the Gate City bank \$7,958.79 and three notes amounting to \$9,345, these transfers not being for the benefit of all its creditors and stockholders, nor for a valuable consideration, and the defendants knowing at the time of its insolvent condition. On the same day it made an assignment of all its property and effects, rights and credits of every kind and character, to plaintiffs as assignees, for the benefit of all its creditors, and the same was accepted by plaintiffs, and the title to the money and notes above mentioned thereby passed to them, and without authority from them or from the Citizens' bank said money and notes were delivered to defendants. Afterwards a bill was filed against the Citizens' bank and others, and under it plaintiffs were appointed receivers with power and direction to reduce the effects of the bank to their

possession ; and afterwards they were directed, by order of the chancellor, to bring suits, as receivers, against the defendants for the recovery of said effects.

The evidence at the trial was as follows: The deed of assignment conveyed to Hill and Thomson, for the benefit of each and all of the bank's creditors, "all and every of its property and effects, rights and credits of each and every kind and character whatsoever, in as full and complete a manner as the same are now owned, held or possessed by it, and as fully as if each and every one was specially named and described herein." It directed that the assignees should convert all of "said effects and property, rights and credits of every kind and character," into cash as soon as the same could be done consistently with its interest, and pay its debts *pro rata* as fast as the same could be done. Thomson and Hill accepted this trust on the same day. The bill under which they were appointed receivers was brought on April 16, 1881, by the Governor of Georgia in behalf of the State against the bank, and against Hill and Thomson as its assignees, alleging that the bank was a State depository ; that on the 13th of April it refused to pay a check of the State treasurer, closed its doors, and had made an assignment of all its property to Hill and Thomson ; that it was largely indebted to the State, had ceased to do business, and was unable to meet its liabilities ; that the assignees had accepted the trust and would take an inventory of the assets with intent to convert them into cash, and, ignoring the right of the State to priority, intended to pay the same to the creditors *pro rata* ; and that unless the assignees were restrained from paying any debts due by the bank, until the indebtedness of the State was first paid off and discharged, a great loss would be entailed upon the State. The prayers were for injunction and receiver. On April 25, 1881, Hon. GEORGE HILLYER, judge of the

superior courts of the Atlanta circuit, upon the hearing, ordered that Hill and Thomson be appointed receivers to "take and hold all the property and effects conveyed to them by a deed of assignment of the Citizen's Bank of Georgia, . . . and that they convert such property into cash as therein provided, as rapidly as the same can be done without unnecessary sacrifice of the assets." The defendants were also enjoined from paying out any money until the further order of the court. At chambers in Rome, Ga., on August 27, 1881, the judge of the superior courts of the Rome circuit passed an order reciting that Judge HILLYER had held himself disqualified to act in a collateral proceeding in the case, and directing that all the orders, judgments and decrees as above stated, and any others not named but which had been made by Judge HILLYER, be confirmed. Afterwards receiver Thomson presented to Judge Hood, of the Pataula circuit, his petition reciting that the judge of the Atlanta circuit was disqualified, and therefore Judge Hood was asked to take jurisdiction "of the matter referred to in this petition." It stated that petitioner and his co-receiver, Hill, who was also president of the Gate City National Bank, felt it their duty to institute suits against various corporations, among them the Gate City National Bank, for the recovery of certain sums which it was alleged these corporations had been paid by the Citizens' bank on the 18th of April, 1881, which payments the receivers were informed were void, and the amounts paid recoverable by them; that Hill, as president, did not think his bank was liable to refund the amount received by it, but wished to discharge his duty as receiver and also his duty as president, and while willing to unite with the petitioner in bringing a proper suit, it would be embarrassing to him to unite in this petition, or to engage actively in the prosecution or management



of such suits as might be brought ; and that petitioner desired to employ certain persons to prosecute the suits, as it was embarrassing to him to determine upon the fees. The prayer was, that petitioner be directed as to the terms of the employment of counsel and what fees should be paid them, and the time and manner of payment. On this petition, at chambers, February 28, 1882, Judge Hood ordered that the receivers proceed to institute suits against the corporations named in the petition, for the recovery of any money paid, or assets transferred to them or either of them, by the Citizens' bank or any of its officers, after the insolvency of said bank became known to its officers on the 13th of April, 1881. The remainder of the order provided for the employment of counsel and payment of their fees. At the time this petition and the order thereon were presented to Judge Hood to be signed, neither the original bill nor any of the pleadings in that case were shown to him, nor did he see any record or any orders, or anything of that kind ; but a statement was made to him by counsel as representatives of the receiver. No notice was given to anybody about the application for the order. The Citizens' bank was insolvent on April 13, 1881, when the assignment was made. About half past eight o'clock in the morning of that day, the cashier sent a telegram to a bank in Savannah, directing it to pay to another bank there whatever credit balance the Citizens' bank had with it, for the credit of the Gate City National Bank. This telegram was probably received by the bank to which it was addressed, at about half past ten o'clock A. M., and by authority of it there was paid over to the credit of the Gate City bank during bank hours on that day, \$7,958.79. The Citizens' bank opened its doors that morning at nine o'clock, and the deed of assignment was drawn and signed between that time and eleven o'clock. The

cashier of the Citizens' bank had no interview with Hill or any officer of the Gate City bank, as to the funds in Savannah, previous to the sending of this telegram, nor was there any understanding as to its transfer. The sending of the telegram was suggested to the cashier by the fact that the Citizens' bank owed the money, and he wanted to pay it and knew no other way to do so. About nine o'clock, the cashier left a message with the cashier of the Gate City bank, asking Hill to come to the office of the attorney of the Citizens' bank. He did not remember that he told the cashier of the Gate City what he wanted with Hill. He was informed that Hill was not then in town but would be in on an early train. At about half past nine, Hill came to the office of the attorney and there met the cashier of the Citizens' bank, and the attorney was then drawing the deed of assignment. The cashier had three solvent promissory notes amounting to about \$9,000, the property of the Citizens' bank, from which he had got them that morning. When Hill came in, he handed him the notes, and thinks he then told him about the transfer of the money in Savannah. He also told him that the Citizens' bank was compelled to suspend, and that he wanted him to take these notes as part payment of the amount due to his bank by the Citizens' bank, and wanted him to act as one of the assignees. Hill received the notes and carried them off. Previously on the same morning, the cashier, who was one of the directors of the bank, had seen its president and the assistant cashier (also one of its directors), and one other director, and it was understood between them that an assignment must be made. The cashier did not remember that he had given any information to any of the directors that he was going to send the telegram, but may have spoken to the president and assistant cashier about it. After the assignment was

prepared, the directors named above, the president and two other directors met and directed its execution. Hill afterwards stated that he had received the money transferred to his bank. At the time the assignment was made, the cashier did not believe the bank was insolvent. It had assets sufficient, at their then value, to pay its debts, in his opinion. He did not know that Hill had any knowledge as to its insolvency. Up to the very morning on which the assignment was made Hill had given it credit for considerable sums of money, frequently without security, and, so far as the cashier knew, had absolute faith in its solvency. The question of the solvency of the bank was not discussed when these notes were transferred. The transfer was made before any of the papers connected with the assignment were completed, and, according to the recollection of the cashier, he told Hill nothing about the proposed assignment until he had delivered the notes to him and had told him about the money being sent, though he was not positive as to the order of time in which these events occurred; they were all about the same time and at the same place. He did not intend to pay to Hill anything more than the indebtedness of the Citizens' bank to the Gate City bank, but upon this trial did not remember what the exact amount of that indebtedness was, and did not remember what he did at that time to ascertain the exact amount of the debt. There was no further consideration for the transfer except the debt to the Gate City bank. Part of the indebtedness was New York exchange which had been bought from the Citizens' bank; and the cashier did not know that it had been determined at the time of the transfer whether the New York exchange would be paid or not, but he did not believe it would be paid because other checks had been refused the day before. He did not remember whether at the time of the transfer there was any

settlement of the debt—adjusting and ascertaining the balances, or not, nor did he think he got a receipt from Hill. Nearly all of the indebtedness of the bank to its creditors remains unpaid. On a large amount of assets which the bank had at the time of the assignment, and which were supposed to be of value, there was great loss after the assignment, for various reasons, by no fault of any of its officers.

In the case of the railroad company the following additional evidence appeared: The bank ceased to do business on April 13, 1881, and closed its doors between ten and eleven o'clock on that day. During that morning the teller was in the bank, paying out money part of the time, up to the hour named. Deposits were not received on that day, but about all the money in the bank was paid out. The railroad company kept an account with the bank, and its treasurer was one Morrill, who was also a director of the bank at that time and had been so connected with it for several years, and for a time as president or vice-president. He resided in Atlanta, where the bank was located, and was there on the day of the bank's failure. The teller was a director of the bank, and so was the cashier. On the 11th day of April, Morrill was told by the cashier that the bank was being hard pressed by its creditors, by the State particularly, it being a State depository, and that he was afraid it would have to close. Morrill replied that he did not think so, that the cashier was more frightened than hurt; or something like that. In the afternoon of the 12th of April, Morrill came by the bank and asked the cashier how he was getting along; and the cashier replied that they were still alive, or something like that. On the morning of the 13th of April, between eight and half past eight o'clock, the cashier came by Morrill's house, and told him the bank would have to suspend that day. They talked the matter over, and

agreed to go to an attorney's office and have him draw a deed of assignment. They did so, and the attorney began to prepare the deed, the cashier staying until he had completed it; Morrill not staying so long, but going away to his office, as the cashier presumed, at the defendant's depot, from which office he was called to come to the bank to a meeting of the board of directors for the purpose of making an assignment; and the assignment was made. Morrill and the cashier got to the attorney's office about half past eight, or a little later, in the morning, and nine o'clock was the opening hour of the bank. Morrill was told by the cashier, on the 11th of April, that the bank was very hard up and a good deal of money was being taken away from it, partly by the State; and that if its creditors continued to press it as they were doing, he did not see how it could weather the storm. Morrill told the cashier that the next day, the 12th, was the pay-day of the defendant, but that he would not take the money that day; and he did not. On the morning of the 13th, at the attorney's office, Morrill asked the cashier how much money the bank had that morning, and the cashier told him as near as he knew, and Morrill said he would go and have a check drawn and get the money for his pay-roll. One Watson was the clerk of Morrill at that time. A little after nine o'clock on the morning of the 13th, Watson came into the bank with a check for \$22,000 or \$24,000, signed by himself for the treasurer of defendant, and was told that there was not enough currency in the bank to pay it. Then \$18,624.28 was counted out to him by the teller, and a check for that amount signed by Watson for the treasurer and drawn on the bank was substituted for the other check. The teller testified that he did not remember exactly how he got the figures in the amount paid to Watson, but that Watson's pay-roll perhaps called for an odd amount in change; he did

not remember whether there was the same amount of change called for in the check first drawn, but Watson made out the latter check simply because the teller did not have the \$24,000 to give him. He did not remember what he told Watson about the amount of money on hand; he found out how much money there was by looking into the safe where the bills and currency were kept, and counted out about the amount of money mentioned and gave it to Watson; he is satisfied this did not take every dollar in the bank, but thinks there was \$800 or \$1,000 paid out on checks after that. In addition to the amount thus paid, the bank owed the defendant, at the time of the failure, \$18,887.10, and possibly some additional amounts. Watson came for the money for the pay-roll in the regular manner, and that was the regular pay-roll day. At the time the bank was closed the State was its creditor as a depositor, in the sum of over \$100,000, and it had divers other creditors. The teller and cashier both testified that when the bank made its assignment, they did not believe it was insolvent. The cashier testified that he was talking to Morrill, in the conversations above mentioned, as one bank officer to another, with reference to looking out for the bank's interest. The defendant had kept an account with the bank all the time after its organization. It was generally the custom of Watson to send a memorandum early in the day to the bank as to the amount and various denominations of money wanted, so as to give the bank notice. It takes a long time to make up a pay-roll of defendant. It further appeared, that at the time of its failure the bank had over \$100,000 worth of certain bonds, and about two weeks or perhaps a month before the failure, \$30,000 of them were turned over to the defendant as security for its deposit in case it became necessary to use it as such, some question having been raised by some of defendant's directors about

Morrill keeping the deposit with the bank, it having happened that some time before the failure of the bank one of its drafts had gone to protest in New York on account of a railroad washout. The bonds referred to the bank never got back, so far as the cashier knew, and they were not charged upon the account of the defendant by the bank. After the receivers were appointed, they told the cashier that they were about to sell the bonds, or had sold them, at about 30 cents on the dollar. The bonds, at the time they were transferred to Morrill, were considered by the cashier fairly worth par. It does not definitely appear from the evidence whether the bonds which came into the possession of the receivers, were the \$30,000 worth referred to above, or other bonds of the same issue, which were the property of the bank. The \$30,000 worth of bonds mentioned did not enter into the amount (\$18,887.10) stated above as being still due by the bank to the defendant, on deposit account, after the failure.

A motion for nonsuit in each case was sustained, and the plaintiffs excepted.

CLIFFORD ANDERSON, attorney-general, J. L. HOPKINS, M. A. CANDLER and HALL & HAMMOND for plaintiffs.

JULIUS L. BROWN, N. J. HAMMOND and JACKSON & JACKSON, for defendants.

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#### THE GEORGIA PACIFIC RAILWAY COMPANY v. DOOLEY.

1. The servant of a railroad company to whom has been delivered a printed copy of its rules governing his conduct as a servant, and who can read and has had sufficient time to become acquainted with them, is bound by every reasonable one which is to govern his conduct while in the service, whether he has read or has knowledge of it or not. But he is not bound by a rule which requires him to waive rights not connected with his duty as a servant, although he know of it, unless he has expressly agreed to it; especially where it requires that the officer employing him shall have it distinctly understood and agreed to by him, and nothing is said to him about it.

86	294
91	66
86	294
105	675
86	294
120	43
86	294
121	640

2. Evidence as to the road-beds of other railroads in Alabama being inadmissible, qualification of the charge by reference to such other road-beds could not be made.
3. The better practice, where either party so requests, is to detach from the declaration before it is handed to the jury the verdict rendered on a former trial, or in some way conceal it. But it appearing by the affidavits of eight of the jurors (the other four being inaccessible) that the former verdict was not known or read by them until after the present one had been agreed upon and signed, it is the same as though the former one had not been delivered to them.
4. The verdict for \$16,044 damages is sustained by the evidence, and is not excessive under the facts.

December 1, 1890.

Master and servant. Railroads. Evidence. Charge of court. Practice. Damages. Verdict. Negligence. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890.

Action for damages. The plaintiff was conductor of the defendant's freight-train at the time of the injury, which was caused by the cars leaving the track in Alabama, on account of its defective condition. He was in his thirty-third year, was receiving wages of \$70 per month, and was stout and healthy. He was thrown out of the caboose to the ground, whereby his heart was displaced, his shoulder was so dislocated that he lost the use of his arm and it is wasting away, his jaw-bone was broken, five of his teeth were knocked out and he cannot close his front teeth to properly masticate his food, his head, side and thigh were cut, and his leg and hand were skinned. The heart displacement impairs its action and prevents proper circulation of the blood, rendering it dangerous for him to engage in manual labor requiring exertion, or in occupations which he followed before the injury. His weight decreased thirty-five pounds. The heart trouble has increased. He cannot earn more than \$20 per month. At the first trial, March 20, 1889, the verdict was for \$15,000 in his favor; at the second, March 14, 1890,



the jury found for him \$16,044. The other facts are reported in the decision.

JACKSON & JACKSON, for plaintiff in error.

HOKE & BURTON SMITH, *contra*.

SIMMONS, Justice.

The controlling question in this case is as to the proper construction and effect of rule 23, which was relied upon by the railroad company to discharge it from all liability to the employee. That rule is as follows :

“The conditions of employment by the company are, that the regular compensation paid for the services of employees shall cover all risks incurred, and liability to accident from any cause whatever, while in the service of this company. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized. Allowance, when made in such cases, will be as a gratuity, justified by the circumstances of the case and previous good conduct of the party. The fact of remaining in the service of the company will be considered acceptance of these conditions. All officers employing men to work for this company will have these conditions distinctly understood and agreed to by each employee before he enters the service of the company.”

It appears from the evidence that Dooley was employed as flagman on the 21st of June, 1887, and then receipted for a copy of the book of rules and regulations which contained rule 23. He was promoted from the position of flagman to that of conductor, whilst he was in possession of the book of rules. He was familiar with the rule which required employees to know the rules and regulations. The accident happened on August 2d, and he had been in possession of the rule-book about forty-two days. Under this state of facts, the able counsel for the plaintiff in error insisted that as Dooley had receipted for the book of

rules and kept them in his possession up to the time of the accident, and remained in the employment of the company, he thereby assented to rule 23 and as matter of law was bound by it, and that the court should have so charged, instead of leaving it to the jury to say whether he assented to the rule or not.

Under the facts of this case, we do not think the court should have charged the jury that Dooley, on account of this rule, could not recover. It will be seen that the last clause of the rule is: "All officers employing men to work for this company will have these conditions distinctly understood and agreed to by each employee before he enters the service of the company." It affirmatively appears from the evidence that this clause of the rule was not complied with by the officer of the company employing Dooley. Dooley's attention was not called to this specific rule; nothing was said to him about it. Therefore he could not have "distinctly understood and agreed" to it. The object of this clause of the rule was to have each employee make an express contract with the company, waiving his right to recover for any "accident from any cause whatever while in the service of the company." If an express contract to this effect had been made by Dooley, under the common law (which governs this case), it is likely he would have been bound by it; but inasmuch as he made no express contract, we do not think he was bound by the rule.

It is insisted, however, that although he made no express contract, there was an implied contract between him and the company, because the company gave him the rule-book which contained this rule; and as he had time and opportunity to read it and remained in the employment of the company, he impliedly agreed to the rule, and therefore could not recover. We think that wherever a corporation employs a person and gives

him its printed rules governing his conduct as an employee, and he can read and has had sufficient time to become acquainted with the rules of the employer, he is bound by every rule of the employer which is to govern his conduct while in the service, whether he has read the rule or has knowledge of it or not. The employer has the right to make rules for the government of his employees—it is to his interest to do so; and he has the right to have those rules obeyed. And an employee has no right to violate them and set up as an excuse his want of knowledge of them, after he has had an opportunity to become acquainted with them. He is bound by every reasonable rule which is to govern him in his work or conduct. If one of these rules should require him to couple cars with a stick, and he should undertake to couple them with his hand and in consequence should be injured, he would not be allowed to say that he had no knowledge of the rule. Or if one of the rules should require him to give so many days' notice before quitting the employer's service, or in default thereof lose his pay, he could not, if he quit the service without such notice, recover his wages because he was ignorant of the rule. This is the principle upon which the cases cited by counsel for the plaintiff in error were decided. *Harmon v. Mfg. Co.*, 35 Maine, 447, 98 Am. Dec. 718, and note; *Preston v. American Linen Co.*, 119 Mass. 403; *Collins v. New England Iron Co.*, 115 Mass. 23; *Stevens v. Reeves*, 9 Pick. 197; *Bradley v. Mfg. Co.*, 10 Fost (N. H.), 487. It will be seen by reading these cases that the rules, in each one of them, were to govern the conduct of the employee while in the service of the employer, and prescribed penalties for non-compliance. But where the rule requires the employee to waive certain rights which are not connected with his duty as an employee, then in our opinion it does not bind him, although he has knowledge of it, unless

he has expressly agreed thereto. The fact that he kept the rules in his possession and remained in the service of the company would not bar his right to recover, unless he expressly agreed to that particular rule. And this is especially so in this case, as the rule itself requires that the employee shall distinctly understand and agree to it. We think, therefore, that the charges complained of on this point, and set out in the grounds 7, 8, 9 and 9(a) of the motion for a new trial, were more favorable to the railroad than they ought to have been.

Under the above view, the special exceptions taken in the 7th and 8th grounds are not material, and would not, if they were sustained, be cause for reversal.

The error complained of in the 6th ground is that "the court did not qualify its instruction by reference to road-beds of other railways reasonably well-conducted in the State of Alabama"; counsel contending that the criterion as to what constituted a road-bed in reasonably good condition was the condition of other well-conducted railroads in Alabama. The court could not have made this qualification without evidence to predicate it upon, and if evidence had been offered as to the road-beds of other railways in Alabama, it would have been inadmissible, as we held in *Railroad Co. v. Chaffin*, 84 Ga. 519.

The fifth ground complains that the court erred in refusing, on motion of counsel for the defendant, to have the verdict rendered on a former trial detached from the declaration before the same was handed to the jury, he insisting that such former verdict would prejudice the defendant's case notwithstanding any instruction which the court might give to the jury on the subject. Speaking for myself, I think the trial judge should have granted this motion. The general rule is, that it is a ground for new trial for any paper or writing to go to the jury and be read by them which is cal-

culated to prejudice or influence them against any of the parties, unless it has been properly admitted in evidence. And I think the verdict of a former jury in the same case might be calculated to prejudice or influence the minds of a succeeding jury, although it had been set aside. It represents the opinion of their twelve predecessors in the same case, that the plaintiff or the defendant is entitled to recover, and when the plaintiff, their opinion also as to the amount of the recovery; and it cannot be denied that the unanimous judgment of twelve upright and intelligent citizens, under oath, sometimes carries great weight, not only with twelve succeeding jurors in the case, but with the community at large. Whether this be sound or not, we all think the better practice is, when either party so requests, to detach, erase or in some way conceal the former verdict, so that the jury cannot know from the papers in the case what that verdict was. Another rule on this subject is, that if a paper or writing calculated to prejudice or influence the jury gets before them illegally, but is not read by them, a new trial will not be granted upon this ground. And the record in this case shows, by the affidavits of eight of the jurors (the other four being inaccessible), that this first verdict was not known or read by them until after the second verdict had been agreed upon and signed by the foreman. This being true, the jury could not have been influenced by the first verdict. If it was not read by them it is the same as though it had not been delivered to them. And substantial justice having been done between the parties, we will not grant a new trial upon this ground of the motion alone. As to papers, writings, verdicts, etc. getting before the jury illegally, and the rules governing the subject, see 2 Thomp. Tr. §§2576, 2580; *Killen v. Sistrunk*, 7 Ga. 294; *Riggins v. Brown*, 12 Ga. 271; *Walker v. Hunter*, 17 Ga. 364; *Lovett v. The State*, 60

*Ga.* 258; *Wilkins v. Maddrey*, 67 *Ga.* 766; *Harriman v. Wilkins*, 20 *Me.* 93; *Green v. State*, 38 *Ark.* 313; *St. Louis, etc. Ry. Co. v. Higgins* (*Ark.*), 14 *S. W. Rep.* 654.

The motion also complains that the verdict was contrary to evidence and excessive. We think there was sufficient evidence to sustain the finding of the jury. If the evidence for the plaintiff is to be believed, the railroad company was very negligent in allowing its cross-ties to become so rotten as this evidence shows them to have been. While the verdict is a large one, the facts of the case show that Dooley was badly and permanently injured, and that from this injury his heart has become displaced or enlarged, so much so that he must be in constant dread of death. An eminent physician testified that if he were in Dooley's condition, he would not run a hundred yards for the universe. We deem it unnecessary to discuss the other grounds of the motion, because the points made therein are immaterial, and would not work a reversal of the case if they were sustained.

*Judgment affirmed.*

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BACON *v.* THE MAYOR AND ALDERMEN OF SAVANNAH.

1. Where the same statute which confers authority for issuing an execution to enforce the payment of an assessment made upon abutting property to defray the cost of improving the street on which such property abuts, provides that the defendant shall have the right to file an affidavit denying that the whole or any part of the amount for which the execution issued is due, an affidavit which in one of its grounds sets forth such a denial in express terms as to the whole and every part, entitles the defendant to a trial upon all questions of law and all open questions of fact involved in the controversy.
2. The constitutional questions raised by the special grounds in the affidavit filed in this case are virtually decided by *Speer v. Athens*, 85 *Ga.* 49, and the authorities therein referred to.
3. A statutory power to improve any of the streets or any portion of the width of any street in the city, includes the power to improve either the whole or less than the whole of any street. One street

86	301
91	504
86	301
103	306
105	63
86	301
106	35
86	301
111	22

may be divided into two sections, and one section improved with a double, the other with a single paved track. The property abutting on each section may be separately assessed for the cost of improving the section to which it belongs. For this purpose each section may be treated as a street.

4. Authority to grade, pave, macadamize or otherwise improve for travel or drainage, is broad enough to comprehend all work and materials embraced in the assessment now in question.
5. Though the statute conferring power to improve the streets contemplates that the power shall not be exercised until after the adoption of an ordinance by a two thirds vote of the municipal body, requiring the improvement to be made and assessing two thirds of the cost thereof on the real estate abutting on each side of the street improved, the ordinance itself need not specify or designate the materials or the kind of materials to be used in paving the street. The choice of materials may be made after the adoption of the ordinance, and by resolution or otherwise as the ordinance may provide.
6. Though the statute certainly contemplates that the tracks of street-railroads and a space of two feet on either side thereof shall be paved or macadamized by the companies at their own expense, and abutting owners cannot be required to contribute to the cost thereof, yet a broad street may well admit of general improvement as a system separate and distinct from the macadamizing or paving of the street-railroads located thereon. Where this is so, abutting owners may be required to contribute their proper part to defray the cost of general improvement, whether the special improvement required of railroad companies be made or not.
7. The statute requires no assessment to be made by ordinance save that which fixes the proportion of cost to be paid by the city as a municipality and by abutting owners respectively. Nor does it require preliminary estimates of amounts, or that amounts be otherwise ascertained and fixed by the ordinance. As the ordinance places the execution of its provisions in the hands of the committee on streets and lanes, the ministerial duties of that committee would include the auditing of bills and ascertaining the actual cost of the work; also, the measurement of frontage and the apportionment of two thirds of the whole cost amongst the several abutting owners according to the frontage of each. The legality and accuracy of these ministerial acts are open to question on a general affidavit of illegality to the execution.
8. Where the statute authorizes the city government "to assess two thirds of the cost . . . on the real estate abutting on each side of the street or lane improved," and requires "the frontage" of intersecting streets and lanes to be assessed as real estate abutting on the street improved, the assessment may be apportioned amongst the several property-owners by frontage alone, without

reference to the depth, superficial area or estimated value of the various parcels of abutting property.

9. The statute requiring the frontage of intersecting streets and lanes to be assessed as real estate, and that the mayor and aldermen shall be treated as owner and pay from the city treasury the just *pro rata* of cost for and according to said frontage, the cost of improving intersections is not to be dealt with separately, paid by the city and deducted from the total cost, but is to be included in such total cost when the apportionment is made amongst the various property-owners, and the city is to be charged just as any other owner with its *pro rata* share of the total cost according to frontage.
10. No part of a street fronts on the street of which it is a part. The intervening space between two paved tracks in the same street is no intersection, nor has the city any ownership of the same different from its ownership of the whole breadth of the street. The city is not chargeable with the margins of this intervening space as frontage.
11. The execution is not invalid because it purports on its face to issue for "proportion of the cost of paving or otherwise improving Liberty street in said city with asphalt in front of and abutting on the said real estate." The real estate must abut on the street, if the street is in front of and abutting on the real estate.
12. The words "time, place and manner of sale" do not embrace the newspaper in which the sale is to be advertised. Consequently §3656(a) of the code does not require that sales for municipal taxes shall be advertised in the same newspaper in which sheriff's sales for city and county taxes are advertised.

December 10, 1890.

Illegality. Statutes. Municipal corporations. Streets. Assessments. Constitutional law. Before Judge FALLIGANT. Chatham superior court. June term, 1890.

Bacon interposed an affidavit of illegality to the levy of an execution against him issued by the city for the amount assessed against him for his proportion of the cost of paving, grading and otherwise improving Liberty street with asphalt in front of and abutting on his real estate. For the present report, the grounds of this affidavit are sufficiently indicated in the decision. A motion to dismiss the affidavit, on the ground that it contained nothing constituting any defence to proceeding with the execution, was sustained, and Bacon accepted.



R. R. RICHARDS and J. R. SAUSSY, for plaintiff in error.  
S. B. ADAMS, *contra*.

BLECKLEY, Chief Justice.

1. The ordinance for improving Liberty street rests directly on the act of 1887, but the remedy by execution for enforcing the assessments made on abutting property is derived from the act of 1885. See Acts of 1887, p. 587; Acts of 1884-5, p. 362. From the terms of the 5th section of the later act it would seem that the provisions of the earlier act in relation to remedy were intended to be brought forward and made applicable to improvements authorized by the later act itself, or rather, by any ordinance passed in pursuance of the authority which it confers on the municipal government. Of course, if the act of 1885 is good for issuing execution without suit, it is also good for the defensive means which it lays down to resist the execution. Touching these means, it says expressly "that the defendant shall have the right to file an affidavit denying that the whole or any part of the amount for which the execution issued is due." In the present case the 17th ground of the affidavit of illegality is in these words: "The amount for which said execution is proceeding is not due and payable by the said real estate or by this defendant as the owner thereof, nor is any part of said amount due or payable by the said real estate or by this defendant as the owner thereof." It is manifest that the affidavit conforms to the statute and is such as to entitle the affiant to a trial upon all questions of law and all open questions of fact involved in the controversy. *Speer v. Athens*, 85 Ga. 49, 11 S. E. Rep. 802. Inasmuch as the motion to dismiss the affidavit of illegality went to the whole affidavit, not being restricted to any one or more of the specific grounds set forth, the court erred in sustaining the motion. This is all that is absolutely necessary to decide on the writ

of error now before us; but upon some of the special questions made in the affidavit and argued at the bar we will indicate our opinion, as these questions will necessarily arise upon the trial of the broad issue which the affidavit presents.

2. In spirit and principle the constitutional questions are virtually decided by *Speer v. Athens*, *supra*, and the authorities to which the opinion in that case refers. And see *Mayor of Birmingham v. Klein* (Ala.) and notes, 8 Lawyer's Reports, 369.

3. The power given by the act of 1887 to improve any of the streets, or any portion of the width of any street in the city, includes the power to improve either the whole or less than the whole of any street. 2 Dil. M. C. §799. In the exercise of this power it was competent for the proper municipal authorities to divide Liberty street into two sections and improve one of them with a double, and the other with a single paved track; and in assessing abutting property to defray the cost of the improvement, it would be obviously just and equitable to treat each section as though it were a separate street. The consequence would be that the property abutting on the double-track section would pay at the rate of cost of that section, and property abutting on the single-track section would pay at the rate of cost for it alone, that rate being less than the former. We discover no infirmity in the apportionment actually made with reference to this special feature in the improvement of Liberty street.

4. The letter of the authority conferred by the act of 1887 embraces "grading, paving, macadamizing or otherwise improving for travel or drainage." This language is broad enough to comprehend all the work included in the assessment and proper materials therefor, as set forth in the statement of cost annexed to the affidavit of illegality and marked "B." We see noth-

ing in that statement which might not fairly be connected with grading, paving, macadamizing or otherwise improving for travel or drainage the street in question.

5. The ordinance, which by the first section of the act requires a vote of two thirds of the municipal body for its adoption, need not comprehend more than a requirement that the street be improved in the manner designated and that two thirds of the cost thereof be assessed upon the real estate abutting on each side. There is no express provision that the kind of materials used or to be used shall be fixed or described by that ordinance, nor is a two thirds vote made requisite to pass any other ordinance, resolution or order touching the subject of improving streets. We are of opinion, therefore, that it was competent to leave the question of materials to be determined by a resolution of the municipal body adopted, not by a two thirds vote, but a majority vote only, that is, a majority of a quorum in attendance, the number sufficient in ordinary acts of municipal legislation. A good reason for not fixing the material by the main ordinance, might be that inquiry and investigation into the matter of cost would probably be incomplete when the ordinance was passed. The making of bids, etc. would necessarily come after the passage of the ordinance, and it might be desirable to invite bidding based on different kinds of material, and thus leave the particular kind to be used for future determination dependent on the amount of the bids respectively.

But it is enough to say that the legislature has not in terms exacted that the ordinance to be passed by a two thirds' vote shall specify anything with regard to materials. That ordinance, as actually passed and adopted, provides in substance that the street be paved with such material as council thereafter, by resolution

adopted by a two thirds vote of the members present, might prescribe. There is no suggestion that the resolution contemplated was not passed in due time and manner, and if it was and the work was done accordingly, we would consider that sufficient.

6. The act certainly contemplates that street-railroad companies having tracks running through any street improved, should be required to macadamize or otherwise pave the railway track and two feet on either side thereof, at their own expense. But this, we apprehend, is chiefly to relieve the municipality and the abutting owners from defraying any portion of the cost incident to this part of street improvement. The question admits of some doubt, but we think the better construction is, that the power to improve a street generally and assess abutting property is not suspended upon the enforcement of the provision touching street-railroads as a condition of otherwise improving the street. By showing good cause, an abutting owner may have the right to compel the city council by *mandamus* to execute the provisions of the act against street-railroad companies. But a broad street, such as Liberty street seems to be, may well admit of general improvement as a system separate and distinct from the macadamizing and paving of the street-railroads located thereon. If this be so, it should be no proper answer by abutting owners, when called upon to contribute their proper part to defray the cost of the general improvement, that the special improvement provided for by the act and confined to street-railroads and two feet on each side thereof has not been made. Certainly the abutting owners cannot be assessed for any part of the cost of such special improvement whether made or not, and it would seem from the record that no part of such cost has in this instance been so assessed in arriving ultimately at amounts chargeable to abutting owners. As

the ordinance only requires the companies to pave between their tracks, it may be that it does, by implication, leave abutting owners exposed to assessment for two feet space on either side. But if so, there seems to be no attempt to execute this part of the ordinance, if we correctly understand the various entries and items of calculation in the statement marked exhibit B above referred to. This question, however, is open for determination as matter of fact.

7. It seems to us that the ordinance goes as far in the matter of assessment as the act requires it to go. It fixes the proportion of the cost to be paid by the city and the abutting owners respectively. The act does not require that any preliminary estimates should be made of amounts, or that amounts should otherwise be ascertained and fixed by the ordinance. It would be altogether impracticable to arrive at the actual cost in time to express it in the ordinance. We see in the act itself no purpose or intention that this should be done. The ordinance places the execution of its provisions in the hands of the committee on streets and lanes, this committee, as we understand the record, being composed of members of the city council. It would devolve, therefore, upon the committee to audit bills and ascertain the actual cost of the work; also to measure the frontage of each property-owner and to apportion two thirds of the whole cost amongst such owners according to the frontage of each owner respectively. These would be ministerial acts in execution of the law of assessment established by the ordinance in virtue of the statutory authority conferred by the legislature. If these ministerial acts were not performed rightly or accurately, they would be open to question by the abutting owners respectively, on such an affidavit as has been filed in this case. None of them, therefore, would be binding on the citizen in a conclusive way, until

after he had had a hearing and an adjudication touching their legality and accuracy.

8. The act by implication authorizes, and the ordinance prescribes apportionment according to lineal frontage on the street improved, and without any reference to the depth, superficial area or estimated value of the various parcels of abutting property. The language of the act is, "and to assess two thirds of the cost . . . on the real estate abutting on each side of the street or lane improved." The ordinance makes the assessment and requires it to be apportioned "according to frontage." It has been held that a city charter which required "the assessors to assess each lot deemed to be benefited 'in proportion to the benefits they deem it to receive'," is well-executed where the assessment was actually made on the lots in proportion to their frontage, notwithstanding some of them had valuable buildings, others had buildings of inferior value and many were vacant. *O'Reilly v. Kingston*, 39 Hun, 285. Moreover, the act of 1885, *supra*, expressly recognizes frontage on the street or portion of the street improved as a right basis for apportioning the cost. And the act of 1887 requires "the frontage" of intersecting streets and lanes to be assessed as real estate abutting on the street improved. This of itself shows that the basis of apportionment as to all abutting property was to be "frontage" as the ordinance prescribes touching the real estate of private owners.

9. With regard to intersections, the act of 1887 declares: "The frontage of intersecting streets and lanes shall be assessed as real estate abutting upon the street paved or otherwise improved, and the mayor and aldermen shall be, for all the intents and purposes of this act, an owner or legal representative of real estate abutting on any street, shall possess the same rights and privileges as all other owners of real estate abutting on any street according to the frontage owned, and shall

pay from the city treasury the just *pro rata* of the entire cost of said work for the said frontage."

We think the proper construction of this language is, that the city, as owner, is to be rated just as any other abutting owner; that is, the intersecting streets and alleys are to be considered as if they were private property. A private abutting owner is not chargeable separately on the basis of cost for improving in front of his own premises, but is chargeable with his *pro rata* share, according to his frontage, of the total cost of improving the street, or that section of the street on which his property abuts: so likewise, the city, as owner, must pay its *pro rata* share of such total cost. Improving the intersections may be more or less expensive than improving a like area in extent elsewhere in the street, but whether more or less, its cost is not to be deducted from the general aggregate before making the apportionment amongst the several property-owners, but is to remain a part of such aggregate, and the city be charged with its *pro rata* of the whole according to frontage just as any private owner is charged with his *pro rata*. The whole cost is to be apportioned and the city, as owner, is to share in the apportionment of the whole. As a municipality it pays one third, and as owner its *pro rata* according to frontage of the other two thirds. The ordinance seems to exclude the city altogether from apportionment as owner, its language being: "After the total cost of said work, exclusive of the frontage of intersecting streets and the work done for said railway companies, shall have been ascertained, one third of such cost shall be paid out of the city treasury and the other two thirds from the persons owning real estate fronting on said portions of Liberty street." In this respect the ordinance departs from the act; and of course the act must be followed ~~rather than~~ the ordinance in ascertaining the amount to be contrib-

uted by each abutting owner. As the act speaks in express terms on this subject, this part of the ordinance may perhaps be treated *not* only as void but as surplusage, but no abutting owner can be compelled to pay any excess with which he may have been charged on account of excluding the city, as owner, from sharing in the due apportionment of total cost.

10. There is no merit in the suggestion that the city is to be chargeable as owner of the intervening space between the two paved tracks on that section of the street thus improved. This space is no intersection, nor has the city any ownership of it different from its ownership of the whole breadth of Liberty street. Whether it is actually used as a part of the highway or thoroughfare makes no difference. The act gives authority to improve the whole breadth of the street or less than the whole, and in either case two thirds of the cost is to be borne by abutting owners, including the the city as owner of the intersections. The city, like other owners, is to be charged on the basis of frontage, and surely no part of a street can properly be said to front on the street of which it forms a part. The act of 1887 treats intersecting streets as fronting on the street improved, and for this purpose makes the two external margins of the latter street solid and continuous throughout the section improved, but it makes no reference to internal margins as fronts or having frontage.

11. That the execution on its face purports to issue for "proportion of the cost of paving or otherwise improving Liberty street in said city with asphalt in front of and abutting on the said real estate," does not render it invalid. It would have been more accurate to say that the real estate described in the execution and upon which the levy was made fronts and abuts on the street. But this must necessarily be true if the street, as the



execution says, is in front of and abutting on the said real estate. The language quoted above does not, as the affidavit of illegality seems to suggest, import that the abutting owner is charged with his proportion of the cost of paving, etc. immediately in front of his own property, and not with his *pro rata* share of the aggregate cost. We have already seen that that aggregate need not include both sections of the street, they being differently improved, but is and should be a separate aggregate for the double-track section, the same being the section on which this particular property is located.

12. There is no merit in that ground of the affidavit of illegality which sets up that the execution sale would be illegal because not advertised in the newspaper in which the sheriff's sales of the county are advertised. The code, §3656(a), relates to the time, place and manner of sale, and neither expressly nor by implication refers to the newspaper in which sales are to be advertised.

If any of the thirty-five grounds, with or without their subdivisions of *a*, *b*, *c*, etc., are not covered substantially by what has been said above, we are to be understood as holding them insufficient in and of themselves to arrest the progress of the execution. But as the affidavit contains at least one ground which is sufficient, and which is broad enough to include all other sufficient grounds, whether specifically set forth or not, the court erred in dismissing the affidavit.

*Judgment reversed.*

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THE SAVANNAH STREET, ETC. RAILROAD CO. v. BRYAN.

A railroad company is responsible to a passenger for a battery by the conductor, committed first on the car, and repeated shortly afterwards at the office of the company whither the passenger had gone to make complaint to the superintendent. The passenger having been badly beaten, kicked, cut with a knife and his arm broken, a verdict for \$2,000 is not excessive.

December 10, 1890.

Railroads. Passengers. Damages. Verdict. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

LAWTON & CUNNINGHAM and E. S. ELLIOTT, for plaintiff in error.

GARRARD & MELDRIM, *contra*.

BLECKLEY, Chief Justice.

The jury found for the plaintiff below \$2,000. The motion for a new trial complains of no error by the court, but attacks the verdict as contrary to law, to evidence, etc., and as excessive in amount. The motion was overruled. This was an approval of the verdict by the presiding judge.

Treating the testimony of the plaintiff and his witnesses as reliable and as presenting the whole truth of the case, there can be no doubt that the verdict was warranted in all respects. The plaintiff, being a passenger on a street-car, was called upon by the conductor for his fare. He had money in his pocket, and telling the conductor to wait a minute, was feeling for a nickel when he was seized by the conductor and ordered off the car. A struggle ensued and the conductor kicked him off the platform, the car being in rapid motion. The plaintiff then repaired immediately to the office of the company for the purpose of making complaint to the superintendent. He reached the office in about 18 or 20 minutes. The conductor arrived at or near the same time. The conductor cursed him, kicked him again twice, hit him with his fist, and shoved him away. Others present took part with the conductor, and plaintiff was badly beaten. The conductor plunged a knife into him. His left arm was broken, and the cut with the knife was in the back of the head. He became unconscious, and was afterwards picked up by a police-

man some two blocks distant from the office. He could not say exactly where and at what time he was cut, but he saw the conductor, while on the platform of the office, draw a knife from his pocket and open it with his teeth. The evidence adduced by the company conflicted with this account in several material respects, but that conflict counts for nothing on this writ of error, the jury having found in favor of the plaintiff and their finding having been approved by the presiding judge. The company is responsible for the unlawful violence and misbehavior of its employees, both on the cars and at the office. *Gasway v. Railroad Company*, 58 Ga. 216; *Peeples v. Railroad Company*, 60 Ga. 231; *Western & Atlantic Railroad v. Turner*, 72 Ga. 292; *City & Suburban Railway v. Brauss*, 70 Ga. 368; *Christian v. Railway Company*, 79 Ga. 460.

There was no error in denying the motion for a new trial.  
*Judgment affirmed.*

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PECK v. LAROCHE & SON.

1. There being but ~~one~~ suit, one petition, one defendant, the clerk has no power, without some direct and express order of the court, to issue ~~more~~ than one process. A second process issued by him of ~~his~~ own will, after the appearance term of the case, is void.
2. Formal entries of continuance made by the judge on the benchdocket at and after the appearance term, do not import any leave or order to issue a second process or extend the time for service.
3. Standing alone, a process is no legal authority to the sheriff to serve the defendant after the appearance term, and where the defendant appears at the first term after the actual service, and without pleading to the action moves to dismiss the same for want of due service, the motion should be granted. Though acquiescence in such defective service might bind the defendant, no acquiescence can be implied when the objection is made promptly by a motion to dismiss.

December 10, 1890.

Process. Service. Practice. Before Judge HARDEN.  
 City court of Savannah. July term, 1890.

86	314
87	739
86	314
120	74
120	114
86	314
124	243

Reported in the decision.

LESTER & RAVENEL, for plaintiff in error.

W. P. LaROCHE, *contra*.

BLECKLEY, Chief Justice.

The declaration was filed April 11th, 1889. The first process was dated on that day and was returnable to the May term of the city court. After the July term had intervened, a second process was issued by the clerk, of his own will and without any order of court on the subject, dated October 14th, 1889, and made returnable to the November term. Personal service was effected upon the defendant on the next day after the second process was issued. No service except this was returned, nor was there any return of *non est inventus*, and the court, so far as appears, had, up to that time, taken no action touching the case except to enter on the bench docket two continuances, one on June 4th, the other on July 1st. At the November term, to which the second process was returnable, the defendant appeared by counsel and, without admitting jurisdiction, moved in writing to dismiss the petition and process because the petition was filed in April and process issued returnable to May term but was not served until October. The motion also recited the further fact that new process was attached returnable to November term. Pending this motion another continuance was entered on the docket, dated January 10th, 1890. On February 12th the motion was overruled by the court.

The statute applicable to the city court of Savannah provides that "All suits in said court (except attachment cases) shall be commenced at least fourteen days before the term to which they are returnable, and the process shall be served on the defendant at least ten days before the session of the court. Suits shall in other respects be conformable to the mode of proceed-

ing in the superior courts, but the process shall be annexed by the clerk of said city court, be tested in the name of the judge thereof, and be directed to and served by the sheriff thereof." Code, §4918. The general law applicable to the superior courts requires that "To such petition the clerk shall annex a process, unless the same be waived, signed by the clerk or his deputy and bearing test in the name of a judge of the court, and directed to the sheriff or his deputy, requiring the appearance of the defendant at the return term of the court." Code, §3334. "The clerk shall deliver the original petition, with process annexed, together with a copy of the petition and process for each defendant, to the sheriff or his deputy, who shall serve such copy upon each defendant residing in the county at least fifteen days before the first day of the term, and within five days from the time of receiving the same, and make an entry of such service upon the original petition, and return the same to the clerk." Code, §3339.

1. The second process issued in this case was a nullity. It is manifest that, where there is but one suit, one petition, one defendant, the clerk has no authority, without some express order of the court, to issue more than one process. His power to issue is then exhausted. The second process was mere blank paper, and consequently is to be eliminated from the premises in reaching a right conclusion touching the validity of the service now in question.

2. The two entries of continuance made before service were mere *memoranda* by the judge on the bench-docket, and did not import that the court had granted any leave or order to issue a second process or extend the time for service. On the contrary, these entries would import that, so far as the judge knew or had reason to believe, the case was pending in court like other cases in which due service had been effected. A

continuance means that the trial is postponed to a succeeding term, not that the time for service is postponed or extended.

3. The first process standing alone was no authority to the sheriff to effect service after the return or appearance term of the case. Had he served it before that time, though less than ten days, the act of 1885 would have aided the service and made it good, not for the appearance term named in the process, but for the next succeeding term, the act substituting the latter in place of the former as the appearance term. Acts of 1884-5, p. 103. This act, however, changes the prior law only where the time of service is before the regular appearance term but too late for that term. As the service here was not only after the appearance term, but after the succeeding term had also intervened, it is obvious that the act has no application.

It will be observed that the defendant appeared at the first term after he was served and made objection by motion to dismiss the action. He is not chargeable, therefore, with any laches or acquiescence. In *Dobbins v. Jenkins*, 51 Ga. 203, not only was the service based on an express order of the court giving further time, but the defendant acquiesced for two years after service was effected and did not move to dismiss the case until it was called for trial. Moreover, the plaintiff made it appear that he had used diligence in the endeavor to obtain service in due time, and the court in its decision recognized the question of such diligence as involved, saying: "When the attention of the court was called to the case at the second term of the court, it would have been its duty to have dismissed it for want of service, unless it had been made to appear to the court that there had been no want of diligence on the part of the plaintiff in having the service perfected on the defendant." The want of due service before the appearance

term of the process was expressly ruled in *Hood v. Powers*, 57 Ga. 244, to be good cause for dismissing the action on motion made at the appearance term. In that case as in this, the defendant moved at the first term after service. So far as appears from the record before us, no cause whatever was shown by the plaintiffs, on the hearing of the motion to dismiss, why service was delayed. The sheriff had made no return that the defendant could not be found, so that there was not even the evidence of such a return to account for the failure to serve in due time. As the plaintiffs did not require the sheriff to make some return of his action, the presumption is that his failure to act, if he did fail, was with their consent or under their direction. In adjudicating upon the motion, we can look only to what was before the court when that motion was decided, not to anything that afterwards appeared upon the trial of issues of fact raised by the plea to the jurisdiction, etc. Exception to overruling the motion was made and entered *pendente lite*, and error on that decision is regularly assigned in the general bill of exceptions which brought the case to this court. Ruling as we do, that the court erred in not dismissing the action, the subsequent proceedings count for nothing. Let the action be dismissed.

*Judgment reversed.*

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WOODRUFF *et al.* v. THE GEORGIA PACIFIC RAILWAY CO.

Where on the trial of an action against a railroad company for a homicide the evidence adduced by the defendant itself showed that its servants were negligent, it was error to charge the jury that "if the company did what the statute required, and was otherwise guilty of no negligence as charged in the declaration, and the plaintiffs' father was killed notwithstanding, his children could not recover."

December 20, 1890.

Negligence. Railroads. Charge of court. Before Judge VAN EPPS. City court of Atlanta. June term, 1890.

The children of Nash sued the railway company for his homicide. Their evidence tended to show that he was killed by the company's train at a public crossing a short distance beyond the limits of the city of Atlanta; that he was not intoxicated, and did not see the approaching train until after the mule he was driving was on the track, or until it was too late to keep his team off; that the train was running rapidly, one witness "guessed" about twenty-five miles an hour; and that the signal which was given by the engine was the alarm signal. There was also evidence as to the age, health and earnings of the deceased. The evidence for the defendant tended to show that a crossing-signal was blown by the locomotive, the blowing not being continued; that the bell was being rung as it approached, and had been rung for some time before Nash was struck; that the train was running at from twelve to twenty miles per hour, and was stopped when it had run a train-length beyond the crossing, the engineer having seen Nash and the mule when the mule's head was about on the track, a distance of thirty or thirty-five feet before the engine reached the crossing, and being unable to see them sooner on account of a curve in the track and obstructions at the side of it; that the engine was reversed and brakes were applied as soon as Nash was seen; and that he was intoxicated.

HOKE & BURTON SMITH, for plaintiffs.

JACKSON & JACKSON, for defendant.

BLANDFORD, Justice.

A verdict was rendered in this case in favor of the defendant in error; the plaintiffs in error moved for a



new trial, which was refused by the court, and they expected.

Exception is taken to the following charge of the court: "If the company did what the statute required, and was otherwise guilty of no negligence as charged in the declaration, and the plaintiffs' father was killed notwithstanding, his children could not recover." The error assigned is that the evidence adduced by the defendant itself showed that the servants of the company in charge of the train were guilty of negligence, and, therefore, this charge of the court was not warranted by the evidence in the case. We think this charge was plainly error, and the exception to the same was well-taken, there being no evidence in the case to authorize the court to so charge the jury, and for this reason the judgment of the court below in refusing to grant a new trial should be reversed.

It is unnecessary to notice any of the other assignments of error, as upon the next trial of the case the court will doubtless correct any errors he may have committed upon the former trial. *Judgment reversed.*

86	320
90	574
86	320
117	422
86	320
118	88

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#### THE GEORGIA RAILROAD AND BANKING CO. v. BROWN.

1. The verdict is sustained by evidence and law, although the evidence is somewhat conflicting.
2. The injury sued for having been caused by the falling of a piece of timber upon the foot of plaintiff in the shop of a railroad company, where he was employed to work, by the alleged negligence of a co-employee, it was not error to refuse to charge: "If the injury to the plaintiff would not have resulted except by the negligence of a fellow-servant, and such negligence of the fellow-servant caused the injury, he cannot recover."

December 20, 1890.

Negligence. Railroads. Master and servant. Before Judge RONEY. Richmond superior court. April term, 1890.

The plaintiff was engaged by the defendant to work in its shops. On the day he was hurt he was put to work at a planer with five other men, two putting timber into the machine, and the others, including the plaintiff, taking it out. One was to take the end of the timber (about 300 pounds in weight and from 16 to 18 feet long) which first came out; another was to catch it in the middle; and the plaintiff was to catch the last end. At the time for the first piece to come out another piece was being pushed into the machine, and the shavings from it flew into his face and blinded him. He caught at the first piece, but it fell upon his foot, being too heavy for him alone to hold, and one of the other men not having hold of it. The bone of his instep was mashed, and since the foot healed he has been able to walk only on the side of it. He was twenty-eight years old. He had been given no warning; was hired to do anything, and made no objection to doing this work. After he was hurt, rollers were put on the machine to take the timbers. The verdict was for \$1,500.

J. B. CUMMING and BRYAN CUMMING, for plaintiff in error.

TWIGGS & VERDERY, *contra*.

BLANDFORD, Justice.

Brown was employed by the Georgia Railroad & Banking Company to work in its shops, and was injured by the falling of a certain piece of timber upon his foot, caused by reason of the alleged negligence of one of the employees of the company in failing to take hold of the timber, whereby, in consequence of its weight, it fell upon his foot and crushed it. A verdict was had for the plaintiff, and the railroad company moved for a new trial, which was refused by the court, and it excepted and says the court erred in refusing to grant a new trial upon each and every ground of its motion.

It is alleged in the motion for a new trial that the verdict is contrary to evidence and the principles of equity and justice, and strongly and decidedly against the weight of the evidence. Looking to the testimony in the case, we find that the same is somewhat conflicting, but we think there was sufficient evidence to sustain the verdict; and therefore the plaintiff in error can take nothing by the first three grounds of the motion for a new trial.

The next error complained of is that the court erred in refusing to charge the jury, at the request of counsel for the plaintiff in error, as follows: "If the injury to the plaintiff would not have resulted except by the negligence of a fellow-servant, and such negligence of the fellow-servant caused the injury, he cannot recover." Upon this ground of error this court was asked to review the case of the *Georgia Railroad v. Ivey*, 73 Ga. 499. In looking at that case it will be seen that the same able counsel asked this court to review the decision in the case of *The Central R. R. v. Thompson*, 54 Ga. 509, in which case it was held: (1) "A railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, whether such injuries are connected with the running of trains or otherwise." (2) "The only distinction made in the code between an employee so injured, and other persons so injured, is that the employee must be wholly blameless to authorize a recovery; others may recover though partly at fault." In the case in 73 Ga. (*Ga. R. R. v. Ivey, supra*), the decision in *Thompson's* case was reviewed at the request of the able counsel for the plaintiff in error, and the court held that, "under the statute law of this State, a railroad company is liable for injuries to the person of an employee by the negligence or misconduct of other employees of the company, without negligence on his

part, whether such injuries are connected with the running of trains or not; that decision has stood for nine years, and the doctrine of *stare decisis* applies." The decision in *Thompson's* case was made in 1875, and has now stood for fifteen years. There has been no attempt on the part of the legislature to alter the construction of the statutes of this State which were therein passed upon by this court, and we do not feel, under the circumstances of this case, that we should interpose now to place a different construction upon those statutes than was done in that case. We think the reasoning of Chief Justice JACKSON in the case of the *Georgia Railroad v. Ivey*, *supra*, is correct, and we will not further inquire as to the correctness of the decision in *Central Railroad v. Thompson*; and while we have carefully considered the decision sought to be reviewed, we have been led to the conclusion that under the statutes of this State, and for the reasons stated in that decision, the ruling therein was correct. It is therefore sustained.

*Judgment affirmed.*

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HERNDON v. STRICKLAND.

Where application was made to the county commissioners to have a certain way over the lands of another "declared a permanent private way," and objections were made, and on the hearing it was not shown that the applicant had any prescriptive right to the use of the way, but on the contrary it appeared that the use which was exercised by him and those under whom he claimed was merely permissive and was not constant and uninterrupted for seven years, a *certiorari* to the judgment of the commissioners directing "that the private way be declared permanent," should have been sustained. The code, §720 *et seq.*, prescribes the manner in which private ways may be opened; but the law does not authorize the ordinary or county commissioners to declare a private way to be permanent.

December 20, 1890.

Private ways. Prescription. Practice. Before Judge LUMPKIN. Elbert superior court. March term, 1890.

Reported in the decision.

JOHN P. SHANNON, for plaintiff in error.

M. P. REESE, G. C. GROGAN and H. J. BREWER, *contra*.

BLANDFORD, Justice.

Strickland applied to the board of commissioners of roads and revenues of Elbert county to have a certain private way over the lands of Herndon declared a permanent private way. Objections were made by Herndon. On the hearing of the case before the commissioners, numerous witnesses were introduced by Strickland, whose testimony tended to show that the road, or a portion of the same, had been in use for some twenty years; that it was traveled in various ways; that there were new turnouts on the road which were used by the people, although the old road-bed could be used; a gate was kept on it until the passage of the stock-law; one of the witnesses in traveling it went any way he saw fit, took near cuts and turned out as he saw fit; when planting season came, the turnouts were planted up to the old road-bed, and they never got to be a plain road; the use of the road had been free and uninterrupted since it was opened, etc., etc. There was some evidence that the road was worked but the same was not kept in good repair.

Herndon introduced other witnesses, besides himself, who testified in substance that the road at one place was 24 feet wide, at another 21 feet, and at a third 27 feet; there were four turnouts, and the wide places were at these turnouts; the road in places other than these turnouts was not over 15 feet in width; the road had been worked recently; that plum trees had grown up in the middle of the road at one place known as the "sink"; that at one turnout the new road had been used for two or three years, weeds had grown up in the old road, and it was no longer used; that in 1884 there

were four turnouts in the road, which were used ; except at these places it was a good and well-defined road ; the road runs 1,400 yards over Herndon's land ; that at one place there is a mud-hole 21 feet wide and 20 yards long, which had not been worked until lately.

The board of commissioners directed that the private way be declared permanent, and by *certiorari* Herndon assigned error, because (1) said private way was never opened by any order of the proper court ; (2) plaintiff's right to have the same made permanent rests upon the ground that it had been in use for seven years, but the whole evidence shows that he has no such prescription, that the way has not been worked and kept in order by him or those under whom he claims, that it exceeds fifteen feet in width and is not confined to any particular fifteen feet in width, but varies to 27 feet, and that it diverges in four places, leaving the old road to avoid roots, trees, mud-holes and gullies, and there has been no constant use of the road, it not appearing that the plaintiff and those under whom he claims title used the road at all from 1883 to 1886 ; and (3) the judgment is contrary to law and the evidence. The court overruled the *certiorari*, and Herndon excepted.

We think, upon the facts of the case set forth in the record, the *certiorari* should have been sustained, and that the court committed error in overruling the same. It is not shown by the evidence that the defendant in error has any prescriptive right to the use of the road over the lands of Herndon ; but on the contrary, it appears that the use of the same which was exercised by the defendant in error and those under whom he claims was merely permissive, and that Herndon could at any time he saw proper forbid any person to use the road over his lands as a private way. If the defendant in error wishes a private way over the lands of Herndon, the code points out the way in which he may proceed

to get it, by paying to Herndon such reasonable damages as he may sustain by reason of the use of such way over his land. The proposition in this case was to make this private way permanent, not a proceeding to remove obstructions put upon the private way, as provided in §738 of the code. Nor does it appear from the facts disclosed by the record that this way over Herndon's land was in the uninterrupted and constant use of the defendant in error, or those under whom he claims, for seven years, so as to make it unlawful for any one to interfere with the road, as provided in §737 of the code. Neither does it appear that this proceeding was for the purpose of declaring this private way a public road, under §741 of the code. Section 731 of the code prescribes that "When a person has laid out a private way, and has been in the use and enjoyment of it as much as seven years, of which the owners have had six months' knowledge without moving for damages, his right to use becomes complete, and such owners are barred of damages." Under this section of the code, the defendant in error should have made it appear to the ordinary, or board of commissioners, that he laid out this private way over the lands of Herndon; that he had been in the use and enjoyment of the same for seven years, and that Herndon had had six months knowledge of it, before he could even have proceeded to have any obstructions removed therefrom. Section 720 of the code *et seq.*, prescribes the manner in which private ways may be opened, but we know of no law that would authorize the ordinary or county commissioners to declare a private way to be permanent. So we think the court committed error in not sustaining the *certiorari* and setting aside the judgment of the county commissioners.

*Judgment reversed.*

## THE GEORGIA RAILROAD AND BANKING CO. v. THOMPSON.

86	327
122	368
123	476

1. The verdict is not contrary to law or evidence.
2. On the trial of an action against a railroad company for the loss of a passenger's trunk, it was not error to charge that if the company failed to deliver it and undertook to deposit it in its warehouse, its liability would be that of a warehouseman, and it would be bound to use ordinary diligence in taking care of it, and if it failed, the plaintiff would be entitled to recover.

December 20, 1890.

Railroads. Carriers. Negligence. Before Judge HINES. Taliaferro superior court. February term, 1890.

The plaintiff was a passenger on the defendant's road. Arriving at one of its stations, her destination, about two o'clock in the afternoon, she left the train, and her trunk was put off there. She gave to the assistant agent of the defendant the check for the trunk, and asked him to put the trunk in the depot for her until she could send for it; and he said he would do so. Not needing the trunk, she did not send for it until three days afterwards. In fact it was not put into the depot but left outside, and was stolen at some time after five o'clock of that afternoon. It was worth \$12 and contained clothing worth \$70. The assistant agent testified that he asked the plaintiff, when she gave him the check, if she wanted him to put the trunk into the depot, and she said no, she would send back for it directly. The plaintiff denied this. The defendant's agent saw the trunk sitting on the corner of the depot-platform, about five o'clock that afternoon. There was no name and no check on it; he had no idea whose it was; did not think it was a passenger's, but thought some one had left it there. There was no request for him to take care of it. In answer to the question why he did not put it into the depot, the assistant agent told the plaintiff's father that he thought the latter would send for it. One witness testified that



the plaintiff's father had stated that it was neglect on her part in not mentioning the trunk to him, and on his part in not going after it, that caused its loss. This was denied by the father. The jury found for the plaintiff \$82, with interest from the time of the loss of the trunk. A motion by the defendant for a new trial was overruled, and it excepted.

J. B. CUMMING, BRYAN CUMMING and M. P. REESE, for plaintiff in error.

H. M. HOLDEN and JAMES WHITEHEAD, *contra*.

BLANDFORD, Justice.

The first three grounds of the motion for a new trial in this case, that the verdict is contrary to law, to the evidence, etc., we think are not well-taken.

It is further alleged as error that the court charged the jury that "if the defendant failed to deliver it (the trunk) and undertook to deposit it in its warehouse, the liability of the railroad would be that of a warehouseman, and they would be bound to use ordinary diligence in taking care of it; and if they failed, the plaintiff would be entitled to recover." We think this charge was correct. Whether the company delivered the trunk to the plaintiff, or to its own agent to be deposited in its warehouse, was a question of fact to be determined by the jury, and the court left that question fairly to the jury to determine. If the trunk had been delivered to the plaintiff, then the company would not have been liable for its loss; the station-agent, under such circumstances, would have been her agent, and she would have to look to such agent in the case of loss; but if the company did not deliver the trunk to her, but to its own agent, then the company would be liable as a warehouseman for ordinary care and diligence in taking charge of it. We think this was a question of fact to be submitted to the jury, and that it was properly sub-

mitted under the charge of the court. Therefore we see no error in the refusal of the court to grant a new trial.

*Judgment affirmed.*

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BISHOP v. THE STATE.

86	329
97	363

One may commit an assault upon another by attempting to commit a violent injury upon him; and if, before the commission of the injury or battery, but after the attempt to commit it, he desist by reason of the importunities of the person assaulted or by reason of other facts or circumstances, this would not relieve him from being guilty of an assault.

December 20, 1890.

Criminal law. Assault. Before Judge LUMPKIN.  
Taliaferro superior court. February term, 1890.

On the trial, the evidence tended to show that as Saggus was riding on a public road at night, Bishop's wife ran after him, caught his bridle and asked him not to let Bishop kill her; that Bishop, who had been cursing her, came on the opposite side of the horse, seized an oak rail eight or ten feet long, and with it uplifted cursed Saggus, asked him what he had to do with it and said he would kill him (Saggus) if he moved his foot in the stirrup; that he held the rail uplifted for a minute or more, was in striking distance, and could have hit Saggus, who told him two or three times not to do so; and that he finally put the rail down on the remonstrance of his wife. In his statement he said that he never intended to hit Saggus, and never drew the rail on him, and that they had always been good friends, etc. After conviction, he moved for a new trial on the grounds stated in the opinion, the fifth ground being that the court erred in charging: "But if he intended to unlawfully commit a violent injury on the person of the prosecutor, and did some overt physical act towards carrying out such intention, desisting from further

attempt to commit the injury, after doing said act, would not relieve him from conviction of an assault." The motion was overruled, and exceptions were taken.

H. M. HOLDEN, for plaintiff in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN, *contra*.

BLANDFORD, Justice.

Bishop was indicted and found guilty of an assault upon one Saggus. A motion was made for a new trial upon the usual grounds that the verdict was contrary to law and the evidence, and further, because the court erred in refusing to charge, without qualification, the following request: "If you believe the defendant intended to commit a violent injury on the person of the prosecutor, but afterwards voluntarily desisted from committing said injury, it would be your duty to acquit the defendant." The error assigned is that the court qualified the request by adding the following, "before doing any act towards carrying out such intention," which made the charge read: "If you believe the defendant intended to commit a violent injury on the person of the prosecutor, but afterwards voluntarily desisted from committing such injury before doing any act towards carrying out such intention, it would be your duty to acquit the defendant." We are of the opinion that the charge of the court, with the qualification annexed thereto, was correct. A person may commit an assault upon another by attempting to commit a violent injury upon such person, and yet, before the commission of the injury or battery, he may desist by reason of the importunities of the person assaulted, or by reason of other facts or circumstances, before the assault has been finished or completed. This, however, would not relieve such person of the charge of assault, if an assault had been committed before he desisted from his purpose of doing another violent injury.

What we have said as to this ground applies equally to the fifth ground of the motion, which is the only other assignment of error. The judgment of the court below in refusing to grant a new trial must therefore be  
*Affirmed.*

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STATHAM v. THE STATE.

The evidence being sufficient to connect the defendant with the offence charged against him, and the alleged newly discovered evidence being that of persons who participated in the offence, but who swore that he did not; and no sufficient reason being shown why they did not testify on the trial, it was not error to refuse to grant the defendant a new trial upon the ground of such newly discovered evidence.

December 20, 1890.

New trial. Newly discovered evidence. Before Judge HUTCHINS. Jackson superior court. February term, 1890.

Reported in the decision.

W. I. PIKE and J. B. ESTES, for plaintiff in error.

R. B. RUSSELL, solicitor-general, *contra*.

BLANDFORD, Justice.

This case was here at the October term, 1889, and will be found reported in 84 *Ga.* 17, the judgment of the court below in refusing to grant a new trial being affirmed by this court. Afterwards, at the February term, 1890, of Jackson superior court, M. J. C. Statham and Joe Statham made a second motion for a new trial upon the following grounds: (1) That Frank Robertson has made certain disclosures and confessions of which these two defendants had no knowledge before the February term, 1889, of Jackson superior court, and they did not know they could prove such facts by said Robertson. (2) Archer, in August, 1889, made known to these defendants facts which are detailed in

86	331
86	377
86	331
126	99

Archer's affidavit appended to this motion. (3) Frank Martin, who was not indicted with these defendants, has, within the last few weeks, made known to them the facts stated in his affidavit attached. In support of this motion movants produced the affidavits of Frank Robertson, Archer, and James Martin, tending to show the following: Martin was not jointly indicted with the other defendants, but was indicted subsequently for the same offence, and pleaded guilty; these affiants were all present and participated in the whipping and maltreatment of Shellnut, and knew all the parties who were present and took part; these parties met at Tucker's house, as they had agreed to do, and proceeded to the house of Shellnut and took him out and hung him and then whipped him; neither of the Stathams nor Andrew Martin were present, nor did they know that Shellnut was to be taken out or whipped, or that a plot or agreement had been made to take him out or whip him, or do anything else with him; it was part of the agreement of the conspirators that nothing should be said or done that would notify the Stathams or Andrew Martin or cause them to suspect that the conspirators were going to do anything to him; the conspirators were Tucker, Robertson, Archer, Arnold, and Frank Martin, and before they went to Shellnut's house they disguised themselves so that they would not be known, and after their disguises were put on, they themselves could not tell who each one was; their disguises were not removed until after they had whipped Shellnut and carried him to Statham's and separated, etc. These and some other facts stated in the affidavits were read in support of the motion. The court refused to grant a new trial as to M. J. C. Statham, and this ruling was excepted to. We think the court did right in refusing to grant the motion for a new trial, the evidence in the record being sufficient to

connect Statham with the offence charged against him, and these witnesses all being *particeps criminis* and no sufficient reason being shown why they did not testify on the former trial of this case. The judgment of the court below in refusing to grant a new trial is therefore  
*Affirmed.*

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SILVEY & COMPANY v. CHAMBLEE.

The evidence plainly showing that the title to the property levied on was in the defendant in the execution (the husband of the claimant), and that she so recognized by taking a mortgage on the property from him to herself, a verdict in her favor was contrary to law and evidence. Though the mortgage may have been foreclosed without her knowledge or consent, it is not shown that the attorney who acted for her was not in fact her attorney.

December 20, 1890.

Claim. Title. Husband and wife. Attorney and client. Before Judge HUTCHINS. Gwinnett superior court. March adjourned term, 1890.

An execution in favor of John Silvey & Company, issued from a judgment of March 20, 1886, against T. C. Chamblee, was levied on 140 acres of land in Gwinnett county. Chamblee interposed a claim as agent for his wife. Upon the trial the execution was introduced, and the claimant admitted that the defendant was in possession at the date of the levy.

The claimant then introduced a warranty deed dated October 19, 1873, from certain persons stated in the record to be five brothers and sisters of defendant, to defendant, conveying to him the land levied upon, in consideration of \$1,000. Also an item from the will of Hosea Camp, giving to his executors in trust for his daughter, Mrs. Horton, the mother of claimant, during the natural life of the mother and then to be divided among her children equally, 320 acres of land, including the land in dispute, all of which the testator esti-

mated to be worth \$1,000; \$500 of which he gave her and her children with property theretofore given to her, to make them equal with the rest of his children in property theretofore given them, and after accounting for the other \$500 she was to receive an equal share in all his remaining property. Also two deeds from defendant to one Bagwell, one dated January 10, 1879, conveying thirty-one and three quarters acres of land; the other dated October 3, 1882, conveying thirty-three and three quarters acres. The testimony for the claimant tended to show the following: The defendant had been in possession of the lands levied upon since 1873. He had sold off to Bagwell the amount described in Bagwell's deeds. He had given in the remainder for taxes every year up to the year he failed in business, when he quit, and claimant began to give it in and has been giving it in since that time. He first began business in 1882 at Park's Mill, about one and a half miles from this land, and there contracted plaintiffs' debt. He paid cash for all he bought up to 1884. At no time while he was in business did he have any other lands except the land levied upon. He never told plaintiff of his wife's interest in or title to this land, nor in any way mentioned that his wife owned or had \$600 interest in the land and he had only \$400. The deed to him was made by agreement of all the heirs of the estate of his wife's mother, and signed by all present, except his wife who was not present. He sold off land to Bagwell and with the purchase money paid himself off for his interest in the land, and now has no interest in it. He borrowed money from his wife and owed her considerable in 1885. He gave her a mortgage on all his personal property to secure a note for \$500 just before he was sued, and a mortgage upon the land levied on to secure a note for \$900, these notes having been given for the money he had borrowed from her and for her in-

terest in the land. He has since paid the \$500 note. The mortgage on realty has been foreclosed. He executed these notes and mortgages to her without telling her about them, when he found that he was "broke," and without her knowing it. The mortgage was foreclosed by her attorney to secure her in case she should fail in her claim to the land levied upon, and she knew nothing of its foreclosure. He had bargained for and lived on the Park's Mill place when he commenced selling goods, and supposed plaintiffs thought he owned that place, which was worth about \$3,000, but he never told them what land he owned; they never asked him. None of the plaintiffs were ever at his store while he sold goods. Exclusive of the land sold to Bagwell, there are about ninety-five acres of the land levied upon. Under the item of the will mentioned above, there were six shares. The other children of Mrs. Horton had received more money than claimant, so that her interest in the tract of land deeded to defendant was estimated at \$600 and that of the other children who signed the deed at \$400, which \$400 defendant paid. While claimant was not present when the deed was signed, she knew of the arrangements, except that there was no agreement in her presence as to whom the deed should be made to. Since the deed was made to defendant he has controlled the land and had tenants on it, and claimant has lived on the land all her life, except about three years while defendant was selling goods at Park's Mill. She had no interest in her husband's business.

In rebuttal, the plaintiffs introduced a mortgage given by defendant to claimant January 5, 1885, upon the land levied on, to secure a note for \$900, a petition to foreclose said mortgage and rule *nisi* issued thereon, and a rule absolute foreclosing the mortgage, dated September 14, 1887. Also a mortgage by defendant to claimant upon certain personalty, dated November 11, 1885, to secure promissory notes for \$500.



The depositions of plaintiffs tended to show the following: The defendant came to their place of business and bought a bill of goods, stating that he owned from \$400 to \$600 worth of real estate; and they would not have sold him the goods if he had not represented himself as being perfectly solvent. These statements were made when he bought his first bill of goods, and occurred when he was in the mercantile business in Gwinnett county. He said he was not dependent upon his store for a living, but had a fine farm which supported him; and they believed the property in dispute was his and therefore gave him credit, and they thought from his statement that he was perfectly solvent and therefore they gave him credit. One of them went to his place of business twice to collect money he owed them, and this one never heard that the property levied upon belonged to any one else until it was levied upon. The first time he was at defendant's store, defendant told him the property was his, and the next time he saw defendant at his house, and defendant again told him it was his. At the second time the claimant was present passing in and out of the room. Plaintiffs would not have given defendant credit had they known his wife was setting up a claim to the property, or an interest in it. They believed defendant's statement that the property levied upon was his. One of plaintiffs testified that when the first goods were sold to defendant, he was not at Park's Mill.

The jury found for claimant "all the land, to wit, ninety-seven and a half acres not sold by T. C. Chamblee to G. L. Bagwell, not subject."

C. H. BRAND, for plaintiffs.

F. F. JUHAN, *contra*.

BLANDFORD, Justice.

A motion for a new trial was made in this case upon

the ground that the verdict was contrary to law and the evidence, which the court overruled, and the plaintiffs in error excepted. We are of the opinion that a new trial should have been granted upon the grounds stated in the motion. The evidence shows very plainly that the title to the property levied on was in the husband of the claimant (who is the defendant in error), that she recognized it by taking a mortgage to the property from her husband to herself, which was foreclosed; and although she alleges that this was done without her knowledge or consent, it is not shown that the attorney who acted for her was not in fact her attorney; so, therefore, what he knew the law charged her with knowing. We think the court did wrong to refuse to grant a new trial in this case, and the judgment is therefore

*Reversed.*

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FOWLER v. JACKSON.

1. After an umpire had been duly selected by arbitrators, and had been sworn as such, the discharge of such umpire from consideration of the case at the instance and request of plaintiff, and the substitution of another in his stead without the consent of defendant, did not furnish a good ground for an exception to the award, it not appearing that the defendant made any objection to the other person acting as umpire, and the defendant having gone on and submitted his case to the arbitrators with such other acting as umpire without objection.
2. Where the suit was for damages to the lands of plaintiff and to his crops, and also for expenses incurred by plaintiff in ditching the lands, clearing the ditches, etc., and the submission provided that the award to be made should cover "all damages to lands, crops, etc.," an exception because the arbitrators awarded damages for the "crops and lands and expenses incurred in ditching, etc.," was not well-taken.
3. The finding of the arbitrators being authorized by the articles of submission, an exception that the evidence showed that the supposed damages of plaintiff could not be more than the imaginary or possible result of defendant's acts and were therefore too remote to be the basis of a recovery, should have been stricken on demurrer.

4. Exceptions which complained that the award was unreasonable, grossly excessive and shocking to the moral sense, being for a sum greater than the entire value of the freehold and not being authorized by the evidence, etc., were not well-taken under the submission and the facts presented to the arbitrators, and the demurrer to them should have been sustained.
- (a) Besides, the exceptions did not show that the award was the result of fraud, accident or mistake, or that it was otherwise illegal, being exceptions of law and not of fact.
- (b) If the exceptions had been that the award was contrary to the evidence, then a full and complete brief of the evidence (or such a brief as the law requires) should have been filed.

December 20, 1890.

Arbitration and award. Practice. Before Judge HUTCHINS. Gwinnett superior court. March adjourned term, 1890.

Fowler sued for damages to his lands from the erection and maintenance by defendant, without plaintiff's consent, of a dam on a river, by which he alleged that the natural flow of water was obstructed and the water caused to overflow his land, his drain-ditches were filled with sand so that he could not keep them open, his crops were destroyed and his lands rendered too wet for cultivation; and that he had been forced to expend a certain sum in making races and aqueducts to convey the water to the river and to supply the ditches before provided. The defendant pleaded the general issue and the statute of limitations; and by agreement of the parties all the matters in controversy were submitted to four named arbitrators and such other arbitrator or umpire as these four might select. It was provided in the submission that the award should be made to cover "all damages to lands, crops, etc. up to the date of said arbitration," and that the award should be final and conclusive and be returned to and made the judgment of the superior court. The arbitrators, together with Mills as umpire, awarded that the defendant pay to the plaintiff \$1,050 "as damages to the crops and lands and expenses incurred in ditching, etc.

of his lands" for the years 1887, 1888, and up to October 7, 1889. For the rest of the report see the decision.

T. M. PEEPLES and C. H. BRAND, for plaintiff.

S. J. WINN and N. L. HUTCHINS, JR., for defendant

BLANDFORD, Justice.

This case was submitted to arbitrators, who made an award in favor of the plaintiff in error, to which award certain exceptions were filed by the defendant in error. A demurrer to the exceptions, on the part of the plaintiff in error, was sustained as to the first, third, fifth and eighth exceptions, and overruled as to the second, fourth, sixth, seventh and ninth.

The second exception taken to the award was as follows: Because, after J. M. Patterson had been duly selected by the arbitrators as the other arbitrator or umpire and had been sworn as such, at the instance and request of plaintiff he was summarily discharged from the consideration of the case, and one John M. Mills was substituted in his stead without defendant's consent. We think the demurrer to this exception should also have been sustained, it not appearing that the defendant made any objection to Mills acting as umpire; and the defendant having gone on and submitted his case to the arbitrators with Mills acting as umpire without objection, we think it is now too late to object to the substitution of Mills for the original umpire. This action in the premises amounted to a consent on his part that Mills should act as such umpire; and therefore we think the court erred in overruling the demurrer to this exception.

The fourth exception was, that although it was provided by the submission that the award should cover only the damage to the lands of plaintiff and to his crops, the arbitrators awarded damages for the "crops and lands and expenses incurred in ditching, etc." We

think the demurrer to this exception should also have been sustained, as the finding by the arbitrators, in our opinion, was fully within the matter submitted to them under the submission in writing.

We think the court erred also in overruling the demurrer to the sixth exception, which was: Because the evidence shows that the supposed damages of plaintiff cannot be more than the imaginary or possible result of defendant's acts, and are therefore too remote to be the basis of a recovery. We think the finding of the arbitrators was authorized by the articles of submission entered into between the parties to this case.

We think the court further erred in overruling the demurrer to the seventh and ninth grounds of exception, which complain that the award is unreasonable, grossly excessive and shocking to the moral sense, being for a sum greater than the entire value of the freehold, and not being authorized by the evidence, etc. We do not think these grounds of exception are well-taken under the submission and the facts presented to the arbitrators, and the demurrer to the same should have been sustained. Furthermore, we do not think the exceptions show that the award was the result of fraud, accident or mistake, or that it was otherwise illegal, being exceptions in law and not exceptions in fact. If the exceptions had been that the award was contrary to the evidence in the case, then a full and complete brief of the evidence (or such a brief as the law requires) should have been filed; and it not appearing that such a brief was filed in the case, we think the court committed error in overruling the demurrer to the exceptions, and the judgment of the court is therefore

*Reversed.*

## HUDSON v. PUETT.

86	341
102	258

In the absence of anything to show why the subscribing witness to a contract was not produced, and of any evidence to prove his signature, the rejection of the contract from evidence because its execution had not been proved, was not error.

December 20, 1890.

Evidence. Contracts. Witness. Before Judge WELLBORN. Hall superior court. January adjourned term, 1890.

Puett sued Hudson for a balance on account, the bill of particulars containing credits of house-rent in certain sums. Hudson pleaded a set-off in which he charged the rent at a larger amount; and there was conflicting testimony as to what this amount should be, and as to what the property was reasonably worth for rent. The decision states the rest of the report.

G. H. PRIOR and W. S. PICKRELL, by J. B. ESTES, for plaintiff in error.

W. F. FINDLEY and H. L. PATTERSON, *contra*.

BLANDFORD, Justice.

A verdict having been rendered in this case in favor of the defendant in error (who was the plaintiff in the court below), the plaintiff in error moved for a new trial, which was refused by the court, and he excepted.

The main ground of error is the refusal by the court to admit a written contract between the plaintiff in error and one Estes on the ground that the execution of the same had not been proved by the subscribing witness thereto, it being offered to show what the plaintiff in error had rented the property for to others, and for the purpose of showing the true rental value of the same. By this contract Estes agreed to pay \$20.00 per month for one year, and there was a subscribing witness to the same. We think the court did right to reject this evidence. There is nothing in the record to show

why the subscribing witness was not produced, nor was there any evidence offered to prove his signature to this contract. Under these circumstances, we know of no rule of law which would authorize the introduction of this evidence; and we therefore affirm the judgment of the court below in refusing to grant a new trial.

*Judgment affirmed.*

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MOORE & COMPANY v. HUGGINS, administrator.

1. First grant of a new trial not disturbed
  2. The bill of exceptions specifies: "All of the evidence embraced in said brief is material to a clear understanding of the errors complained of, and is specifically referred to and made a part of this bill of exceptions. The petition, plea, motion for new trial, brief of evidence, and the affidavit of H. H. Huggins as to newly discovered evidence, are parts of the record material to a clear understanding of the errors complained of." *Held*, a sufficient specification under the act of 1889.
- (a) The brief of evidence filed upon motion for a new trial is a part of the record, and may as a whole be specified as such.

December 20, 1890.

New trial. Practice in Supreme Court. Before Judge WELLBORN. Hall superior court. January term, 1890.

Reported in the decision.

T. W. RUCKER and S. C. DUNLAP, for plaintiffs.

A. S. ERWIN, F. M. JOHNSON and J. L. HOPKINS, for defendant.

BLANDFORD, Justice.

The court granted a new trial in this case. This being the first grant of a new trial, we see no error on the part of the court in granting the same; and whatever errors the court may have committed on the former trial of the case it is to be presumed he will correct on the next trial.

A motion was made to dismiss this case upon the hearing before this court, upon the ground that the

record was not properly specified in the bill of exceptions. The specification is as follows: "All of the evidence embraced in said brief is material to a clear understanding of the errors complained of, and is specifically referred to and made a part of this bill of exceptions. The petition, plea, motion for new trial, brief of evidence, and the affidavit of H. H. Huggins as to newly discovered evidence, are parts of the record material to a clear understanding of the errors complained of." The certificate of the judge certifies that the bill of exceptions is true and contains all the evidence, and specifies all the record, material to a clear understanding of the errors complained of; and directs the clerk of the court of Hall county to make out a complete copy of such parts of the record in the case as are in the bill of exceptions specified, and to certify the same as such, etc. We think the bill of exceptions specifies fully and particularly such parts of the record as the plaintiff in error desired brought to this court, and the court below ordered the clerk to send up such parts of the record as are specified. This was all that the act prescribing in what manner writs of error are to be brought to this court, requires to be done. The brief of the evidence filed upon the motion for a new trial in this case is a part of the record and may be specified as such, and need not be specified more particularly as the testimony of certain witnesses and certain documentary evidence introduced upon the trial. The brief of evidence is but a part of the record, although it may contain many facts and many particulars; and when it is specified as a part of the record, this complies with the terms of the act. We think, therefore, the defendant in error can take nothing from his motion to dismiss this case. Motion overruled.

*Judgment affirmed.*



## MONROE v. SIMMONS.

One who was born in 1857, and for whom a guardian was appointed in 1866, was not barred of recovery from the surety of his father's administrator, in a suit commenced on the 29th of August, 1887, his father having died in December, 1857, or January, 1858; the administrator having sold the estate, settled with all the heirs at law except the plaintiff, left Georgia prior to 1865 and since resided out of the State; and the guardian never having received anything from him on account of the plaintiff's interest, and having died when the plaintiff reached majority. The administrator could not have accounted with the plaintiff while he was a minor and had no guardian; and there having been no breach of the administrator's bond prior to 1866, no right of action had accrued to the plaintiff; and the failure of his guardian to sue for his interest will not operate to his prejudice. This differs from a case where an infant legatee, heir at law or trust beneficiary is barred by the failure of the executor, administrator or trustee to sue within the time required.

December 20, 1890.

Administrators. Actions. Limitations. Minors.  
Before Judge GOBER. Pickens superior court. April term, 1890.

Reported in the decision.

J. A. BAKER, for plaintiff.

C. D. PHILLIPS and W. H. SIMMONS, for defendant.

BLANDFORD, Justice.

This case in the court below was referred to an auditor who held, and so reported to the court, that the plaintiff in error (who was the plaintiff in the court below) was barred of his right to recover, under the act of the 16th of March, 1869, which required all causes of action which originated or accrued prior to the first of June, 1865, to be brought by the first day of January, 1870, or the same should be thereafter barred. The case is this: P. D. Monroe, the father of the plaintiff in error, died intestate "in December, 1857 or January or February, 1858," leaving surviving him his widow, a daugh-

ter, a son, and the plaintiff in error. T. L. Monroe took out letters of administration upon his estate, which was valued at about \$4,000, at the June term, 1858, of the court of ordinary of Pickens county, giving bond and qualifying as such administrator. Afterwards one of the sureties on the administrator's bond applied to the ordinary to be relieved, and at the July term, 1862, was discharged, the administrator giving a new bond with James Simmons as his surety. It further appears that T. D. Monroe, the plaintiff in error, and one of the heirs of P. D. Monroe, deceased, was born in the latter part of the year 1857, and therefore never arrived at age until 1878. The administrator sold the estate of P. D. Monroe, deceased, and settled with all the heirs at law except the plaintiff in error, who was then a minor; left the State of Georgia prior to the year 1865, taking with him all the money realized from the estate of the intestate, except that which had been distributed among the widow and other heirs at law, and has since resided outside of this State. In 1866 a guardian was appointed for the plaintiff in error, but said guardian never received anything from the administrator on account of his ward's interest in said estate. The ward became of age in 1878, at which time his guardian died. He brought this bill on August 29th, 1887, against Simmons, the surety of the administrator, alleging that the administrator still resided outside of the State, and he and his surety failed and still fail and refuse to account and pay over to him his distributive share of said estate. The question in the case, therefore, is whether the auditor was right in holding that the plaintiff in error was barred by the statute of limitations, either under the act of 1869 or any other statute of this State.

We do not think the plaintiff in error was barred of his right of action by virtue of the act of 1869. When

the administrator of the father of the plaintiff in error sold the property belonging to his intestate's estate and converted the same into money, his duty was to pay off the debts of the estate, and then give to the several heirs their distributive share of what remained in his hands. He could not have accounted with the plaintiff in error, because the plaintiff in error was then a minor and had no guardian. Hence we do not think he was guilty of any *devastavit*, or that he incurred any liability to the plaintiff in error (he being a minor and without a guardian), until the year 1866; and there being no breach of the bond prior to 1866, therefore no right of action accrued to the plaintiff in error prior to that time. We do not think the act of March 16th, 1869, governs this case, as by the very terms of that act, the plaintiff's right of action not accruing until after the first of June, 1865, the limitation therein prescribed would not attach to plaintiff's claim. See Acts of 1869, p. 133. Nor do we think the failure of the guardian to bring a suit in the name of his ward, after he was appointed in 1866, can be imputed to the minor. We think the saving in the statute (Code, §2926) that "married women, infants, idiots or insane persons, or persons imprisoned, who are such when the cause of action accrues, shall be entitled to the same time, after the disability is removed, as is prescribed in this code for other persons," applies to this case. See *Jordan v. Thornton*, 7 Ga. 517; *Munroe v. Phillips*, 64 Ga. 32. The right of action in this case being in the plaintiff in error who was a minor, and not in his guardian, the exception in favor of infants is one in his favor; and because the guardian might have sued in the name of his ward to recover the property, but failed to do so, will not operate to the prejudice of the infant. This is not a case as of a trustee, executor or administrator, who having failed to bring suit within the time re-

quired by law, the infant *cestui que trust* or infant legatee or heir at law would be barred. We are of the opinion that the statute of limitations (other than the act of 1869), which is prescribed in our code, did not begin to run against the plaintiff in error until his arrival at majority in the year 1878; and he having brought his action for a breach of the bond within twenty years from the time of his becoming of age, he is not barred by the statute of limitations of this State from prosecuting the same. So we think that the court below committed error in overruling the exceptions of the plaintiff in error to the report of the auditor finding that the plaintiff in error was barred by the statute of limitations; and the judgment of the court is therefore  
*Reversed.*

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MANN v. THOMPSON.

86	347
96	759

Where in 1890 a sale in parol and delivery of a yoke of oxen were made, upon the condition that when the vendee paid for them they were to be his, and the contract was not reduced to writing, the property was subject to levy and sale under an execution against the vendee from a judgment obtained in 1887.

December 20, 1890.

Vendor and purchaser. Sales. Title. Before Judge MILNER. Catoosa superior court. February term, 1890.

Reported in the decision.

R. J. McCAMY, for plaintiff.

No appearance *contra*.

BLANDFORD, Justice.

This was a *certiorari* which issued out of the superior court to the justice's court, and was returnable to the superior court. The answer of the justice to the writ of *certiorari* disclosed the following facts: In 1887 Mann, the plaintiff in error, obtained a judgment against one Webb in the justice's court. In 1890 Thompson sold

and caused to be delivered to Webb one yoke of oxen, upon the condition that when Webb paid for them they were to be his. This contract between Thompson and Webb was not reduced to writing. Mann caused the execution upon his judgment against Webb to be levied upon these oxen, and Thompson interposed a claim to the same. The jury found in favor of the claimant under these facts in the justice's court, and the *certiorari* in this case was prosecuted by Mann to set aside the verdict of the jury. The court below overruled the *certiorari*, thereby affirming the judgment rendered in the justice's court. To this ruling Mann excepted, and says the court erred in overruling the *certiorari* and in not sustaining the same.

This case differs from that of *Conder v. Holleman & Ballard*, 71 Ga. 93, in this: in that case the bill of sale retaining the title in the vendor was in writing, whereas in the present case it is in parol. The code, §1955(a), (Acts of 1873-9, p. 143) provides that, "Whenever personal property is sold and delivered with the condition affixed to the sale that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise." Had this contract between Thompson and Webb been reduced to writing, then the present case would run all fours with the case cited in 71 Ga., *supra*. Under this section of the code, however, to make this conditional sale valid and binding as against the plaintiff in error, it should have been in writing; otherwise it would not be binding upon Mann. And we think the court below erred in overruling the *certiorari* and in not reversing and setting aside the judgment rendered in the justice's court in favor of Thompson, the claimant. *Judgment reversed.*

## CRAWFORD v. RYALS.

1. Denial of a nonsuit was not error; and the evidence was sufficient to authorize the verdict.
2. On the trial of a suit in a city court for damages from the killing of a cow and calf, the plaintiff having stated that he would not insist on damages for the killing of the calf, the defendant moved to dismiss the action because the plaintiff's claim was thus reduced to an amount under the jurisdiction of the court; whereupon the plaintiff, before any judgment was rendered on the motion, said he would insist upon damages for the killing of the calf. *Held*, not error then to overrule the motion.

December 20, 1890.

Nonsuit. Damages. Practice. Before Judge ATTAWAY. City court of Cartersville. June term, 1890.

The action was for thrice the value of a cow worth \$30 and a calf worth \$10, alleged to have been killed by Crawford and Hicks within an enclosure not enclosed by a lawful fence. The evidence for the plaintiff tended to show that the cattle were worth the amounts mentioned; that he found them dead in Crawford's field; that the cow had been shot and died of the wound, but it did not appear what killed the calf; that about three weeks before the killing, Crawford told Hicks, his employee, to get a gun and shoot the plaintiff's cows in his field, but Hicks did not do so; and that Crawford's fence was not a lawful fence. Crawford testified (after the motion for a nonsuit was overruled) that he did not kill the calf and did not know how it died, but he shot the cow because the plaintiff had told him to do it; that the cow was worth about \$10 and the calf about \$5; that they had been in the field several times, and on one occasion he took them and kept them in his lot several days and notified the plaintiff to come and get them; that he told plaintiff how annoying they had been, and plaintiff said they were mischievous and he had no place to keep them and could not control them, and that if they got into the field again, to kill them.

The plaintiff denied that he so said. Hicks and another witness corroborated Crawford. The jury found for the plaintiff \$60. For the rest of the report see the opinion.

M. R. STANSELL, for plaintiff in error.

J. A. BAKER, *contra*.

BLANDFORD, Justice.

This was an action brought in the city court of Cartersville by Ryals against Crawford and Hicks to recover damages for the killing of a cow and calf, which damages were alleged to be \$120.00. The plaintiff recovered a verdict in the court below against Crawford, who made a motion for a new trial upon the following grounds: (1) Error in refusing to nonsuit; (2) verdict contrary to evidence, etc.; (3) error in refusing the motion to dismiss the action. The court overruled the motion for a new trial, and Crawford excepted.

We think there was no error in refusing to nonsuit the case, as we think the evidence was sufficient to authorize the case being submitted to a jury. Nor do we think the verdict was contrary to the law or the evidence; we find the evidence was sufficient to authorize the jury to find as they did in this case.

The plaintiff having stated that he would not insist upon a verdict for damages for the killing of the calf, the defendant in the court below moved to dismiss the action because it reduced the claim of the plaintiff to under \$100, and according to the law organizing the city court of Cartersville, that court did not have jurisdiction of any amount under \$100. Thereupon the plaintiff, before any judgment was rendered by the court on the motion to dismiss, said he would insist upon damages for the killing of the calf. The court then overruled the motion to dismiss, and this ruling is complained of. We think the court very properly over-

ruled the motion, and committed no error in so doing. And in looking upon the whole case, we discover no error committed on the part of the court below; and the judgment overruling the motion for a new trial is therefore  
*Affirmed.*

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THE EAST TENN., VA. & GA. RAILWAY CO. v. WARMACK.

1. The verdict was in accordance with law and evidence.
2. A charge as to the measure of damages, which did not injure the plaintiff in error, is not ground for new trial.
3. It appearing that the injury occurred because the railroad company violated the law in running its train to and over a crossing in an illegal manner, it was not error for the court to refuse to charge the jury that, to make the company liable, the failure to comply with the law must operate as a cause of the injury, and if the injury would not have occurred but for such violation of law, then the company would be liable, otherwise it would not.
4. The admission of evidence as to damages on account of the loss of hire of the mules in question, if error at all, was not such error as would give the plaintiff in error a right to complain, it not appearing that the jury allowed any damages for such loss of hire, and the amount of damages found being fully authorized by the evidence as to the injury to the wagon and the mules, which damages were sufficiently alleged in the declaration.

December 20, 1890.

Railroads. Damages. Negligence. Charge of court. Evidence. Before Judge MILNER. Whitfield superior court. April term, 1890.

The allegations of the declaration as to the damages sustained were, that the railroad company "has damaged petitioner three hundred dollars," and that its train collided with his wagon and team "and demolished the greater part of said wagon and badly crippled the four mules of petitioner used with said wagon, to the damage of petitioner three hundred dollars."

The evidence for plaintiff tended to show the following: Denman, who was in charge of the wagon and team when the collision occurred, drove up within



about forty feet of a public crossing upon which the train was standing, waited until it moved forward and the crossing was cleared, and then went on with the team, thinking, from the speed at which the train was moving, it would not come back; but when he got on the track, the train ran back at a rate of fifteen or twenty miles per hour and struck the hind wheels of the wagon. The cars were about forty feet away and had just cleared the crossing when Denman started across. The wagon was coupled pretty long, for hauling lumber, and the length of the wagon and four mules attached to it was about twenty-five feet. The train was standing still, and had not been switching back and forth so far as Denman saw; and when he started across, the train was on the north side of the crossing, moving rapidly forward; when he reached the track the train was about fifty feet from the crossing, and then had started backwards; if he could have got six feet further, he would have been out of danger. None of the train-men were near Denman or on the ground, that Denman saw, but the man who seemed to be running the engine was looking at him when the train struck the wagon. The hind wheels were torn to pieces, and the hounds and brake were broken. The wagon was new, and was damaged \$25 or \$30; the harness was badly torn up and was damaged from \$3 to \$5. The mules were dragged by the train. Denman thought two of them were injured about \$50 each, and the other two about \$5 each. A. J. Warmack testified that the mules were damaged \$25 each; that plaintiff, his brother, let him have the two least injured, and he did light work with them for their feed; that the two worst injured did little or no work; that a team and driver were worth \$2.50 per day, and that the driver was worth fifty cents per day. The testimony of plaintiff and of others tended to show that two of the mules

were skinned on the sides and legs, and they all seemed to be stiff and strained; that one of them was damaged \$75, one \$50, one \$25 and one \$10, and those worst injured did but little work from October 14, 1887, the time of the injury, until March following, when plaintiff sold one of them, the other two being worked some but not all the time; that the one the worst injured, a few days after the injury, appeared to have some trouble with its eyes, which plaintiff had never noticed before the injury, and which might have been caused by a strain; that each pair of the mules was worth before they were injured, \$300; that he sold one pair in the following March for \$225, and one of the others afterwards for \$115.

The testimony for the defendant tended to show as follows: At the time of the collision the engineer had gone into a station-office for orders, and the engine was being handled by the fireman. The train had been standing three or four minutes. The engine and ten or fifteen cars moved up north of the crossing. The road curves to the left, and there is an embankment on the left side six or eight feet high, upon which some lumber and ties were piled. This curve of the road prevented the man handling the engine from seeing any one on the crossing; and if the engineer had been on the engine, in his usual position, he could not have seen any one on the crossing on account of the curve. None of the train-hands were at the crossing, and the conductor was forty or fifty yards south of it, and a train-hand had gone with the train to change the switch. The train came back at a speed not over three or four miles an hour. The wagon was not damaged more than \$18 or \$20. Only one of the mules was injured; it had a skinned place on its leg and one on its side, both about the size of a silver dollar; and they were not damaged much, if anything.

The jury found for the plaintiff \$174.50. The defendant moved for a new trial on the grounds stated in the opinion.

BACON & RUTHERFORD, DORSEY & HOWELL and MADDOX & LONGLEY, for plaintiff in error.

R. J. & J. McCAMY, *contra*.

BLANDFORD, Justice.

Defendant in error sued the railway company for damages sustained by reason of the negligent running of the company's train, whereby a collision was caused with defendant's wagon and team, in which the wagon was damaged and the mules badly crippled. A verdict was had for the defendant in error; the railway company moved for a new trial, which was overruled by the court, and it excepted.

It is complained by the plaintiff in error that the verdict of the jury was contrary to law, to the evidence, etc. We think, however, that the verdict was in accordance with the law and the evidence in the case.

It is further alleged as error that the court charged the jury that "The measure of damages is the difference in the value of the mules before and after the injury occurred, and you may add thereto any damage the plaintiff may have sustained on account of loss of time of the mules, if the proof shows any." We do not think the plaintiff in error was in any way injured by this charge, as it does not appear that the jury added to their verdict any damage on account of the loss of time of the mules.

The 4th assignment of error complains that the court refused to give the following request in charge to the jury: "A railroad company would not be liable for an injury simply because at the time the injury happened the train might be running or handled in a manner forbidden by law, but to make the company

liable in such a case the failure to comply with the law must operate as a cause of the injury; in other words, if the injury would not have occurred but for such violation of law, then the company would be liable, otherwise it would not." We think the court did right to refuse this charge, because, according to the evidence, it appears that the injury occurred by reason of the company having violated the law in running its train to and over the crossing in an illegal manner.

The 5th assignment of error complains that the court permitted the witness Andrew Warmack to testify that the hire of the mules was worth \$2.75, and the driver would be worth 50 cents per day, which would make the hire of the mules \$3.25 per day; this testimony being objected to on the ground that it was illegal and that the pleadings did not authorize the introduction of proof of value of the mules, there being nothing claimed in the declaration for hire. We do not think there was any error in permitting this testimony; at least, not such error as would give the plaintiff in error a right to complain of here, as it does not appear from the record that the jury allowed any damage on account of the loss of hire of the mules, and the amount of damages found by the jury was fully authorized by the evidence as to the injury to the wagon and mules, which damage was sufficiently alleged in the declaration.

*Judgment affirmed.*

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KING v. THE STATE.

85	355
93	500

1. This conviction of murder was without evidence to support it. The evidence, which is circumstantial, though affording a supposition of guilt of the accused, shows no motive on his part to commit the crime and does not connect him therewith, if any was committed; nor is it sufficiently strong to exclude from the minds of the jury every reasonable doubt as to his guilt, or every reasonable hypothesis other than that of his guilt.

2. Where the evidence makes a doubtful case for conviction, it is error for the judge, in response to a request by the jury to be recharged, to say to them that the case is too plain, or plain enough. December 20, 1890.

Criminal law. Evidence. Before Judge MILNER. Gordon superior court. February term, 1890.

The character of the evidence may be seen by the former report (84 Ga. 524). The verdict was the same on the second trial as on the first.

W. R. RANKIN, E. J. KIKER and T. C. MILNER, for plaintiff in error.

G. N. LESTER, attorney-general, A. W. FITE, solicitor-general, and F. A. CANTRELL, *contra*.

BLANDFORD, Justice.

When this case was before this court at a former term, a new trial was granted upon the ground that we thought that justice required another trial of the case so as to give the State an opportunity of furnishing, if possible, further evidence as to the guilt of the accused. Another trial has been had and the plaintiff in error again found guilty; he moved for a new trial, which was refused by the court, and he excepted.

The main assignment of error is that the verdict is contrary to law, to the evidence, and without evidence to support it. We think, upon an examination of the testimony in the case, that this conviction was without evidence to support it, and that the verdict of the jury was wrong. In criminal cases the rule is, that the evidence must be so strong as to exclude from the minds of the jury every reasonable doubt as to the guilt of the accused. We do not think the evidence in this case is sufficiently strong to leave no doubt upon the minds of the jury as to the guilt of the accused. To our minds the evidence affords merely a supposition as to the guilt of the accused, there being no evidence of any grudge or motive on the part of the accused to commit this

crime, or any evidence to connect him with the same, if any crime was committed. So we think the verdict of the jury was wrong and should have been set aside by the court.

A further rule is, that in cases of circumstantial evidence, the evidence should be so strong as to exclude every other reasonable hypothesis than that of the guilt of the accused. In this case, as shown by the evidence, others may have committed this crime (if crime it was), and there is as much reason to suppose that others did so as to suppose that the accused did it. There was an equal opportunity for others to have done it as for the accused; and according to the evidence, it is quite as reasonable to suppose that the deceased came to his death by reason of an injury inflicted by a train on the railroad as at the hands of the accused. Under such circumstances, this court is not satisfied to allow the conviction to stand; and if the State cannot strengthen its evidence on the trial hereafter to be had, there should be a verdict in favor of the accused.

Another complaint made in the motion for a new trial is, that the court committed error in refusing to recharge the jury, when so requested by the jury through the sheriff, telling the officer who bore the request from the jury that the case was "too plain" or "plain enough," and he would not further charge them, which answer by the court was conveyed by the sheriff to the jury. This statement by the court, through the sheriff, to the jury, we think was not error if he meant that the case was so plain that the jury ought to find the defendant not guilty; but if he meant that the case was so plain that the jury ought to find the defendant guilty, then we think it was error. He doubtless meant the latter, because he refused to grant a new trial in the case. While we would not reverse the judgment of the court below upon this account in a plain case, where the ver-

dict of the jury was in accordance with the evidence, yet we think in a case such as this, such error would of itself authorize a reversal. Upon a consideration of the whole case, we do not think there is sufficient evidence against the accused to authorize a jury to find him guilty.

*Judgment reversed.*

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CRAWFORD *et al.*, commissioners, v. GLASGOW *et al.*

Under the act of 1874 establishing the board of commissioners for Bartow county, those commissioners have no power to establish or change any of the militia districts of the county.

December 20, 1890.

County matters. Militia districts. Before Judge MILNER. Bartow superior court. July term, 1890.

The case was made by petition for the writ of prohibition to prevent the county commissioners from laying out a new militia district. They demurred on the ground that the remedy was by *certiorari* and not by prohibition, and because they had jurisdiction to lay off and create new districts. The judge made the writ absolute, and exceptions were taken.

M. R. STANSELL, for plaintiffs in error.

AKIN & HARRIS, *contra*.

BLANDFORD, Justice.

The question in this case is whether the county commissioners of Bartow county, by the act of 1874 organizing said board of commissioners and authorizing their appointment for the county of Bartow, had authority to establish militia districts. The constitution of 1868 devolved upon the ordinaries of the several counties of this State the right to exercise all the powers as to county matters which had theretofore been exercised by the justices of the inferior court. Section 337 of the code prescribes that the ordinary, when sitting for

county purposes, has original and exclusive jurisdiction over certain subject-matters therein named, one of the same being the establishing and changing of election precincts and militia districts. This power was originally conferred upon the justices of the inferior court in the several counties of the State, but by the adoption of the constitution of 1868, the power to establish and change election precincts and militia districts was conferred upon the ordinaries of the several counties, when sitting for county purposes. The act of 1874 (Acts of 1874, p. 330) establishing a board of commissioners for the county of Bartow, confers upon the county commissioners all powers which, by the constitution of 1868 (Code, §337), were conferred upon the ordinary of the county. The power to establish and change election precincts is distinctly given to the commissioners without conferring the power of establishing or changing militia districts. Hence, we think under this act the board of commissioners of Bartow county had no power or authority to establish or change any of the militia districts of Bartow county. The maxim *inclusio unius est exclusio alterius* applies to this case. So we think the judgment of the court below ought to be

*Affirmed.*

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CLAY v. CLAY *et al.*

Injunction and receiver. *Lis pendens.*

BLECKLEY, C. J.—There was no abuse of discretion in denying an interlocutory injunction and receiver. Under the doctrine of *lis pendens* the fruits of the litigation, if any, as to the *corpus* of the real estate will be secure; and as to income, choses in action, etc., the solvency of one of the defendants affords reasonable security against loss.

*Judgment affirmed.*

December 23, 1890.

From Bibb superior court. Before Judge MILLER, at chambers, June 10, 1890.

HARDEMAN & NOTTINGHAM, for plaintiff.

R. W. PATTERSON, for defendants.

86 350  
1111 895

86 350  
130 361



## GREEN v. FRANKLIN.

86 360  
120 384

A judgment debtor having conveyed a growing crop as security for a debt before maturity of the crop, and the conveyance not having been recorded within thirty days, nor until after the crop had matured and was levied upon by virtue of the judgment, the lien of the judgment was superior and would prevail against a claim interposed by the holder of the unrecorded conveyance.

December 23, 1890.

Liens. Judgments. Record. Before Judge LUMPKIN. Wilkes superior court. May term, 1890.

On February 5, 1887, Franklin obtained a common law judgment against Shepherd for \$61 principal. On May 18, 1889, Shepherd gave to Green an unconditional bill of sale to Shepherd's entire crop, then planted on certain land, which land was described in the bill of sale and the crop described as being fifteen acres in cotton and eight acres in corn, all unincumbered except for 2,000 pounds of seed-cotton for rent. This bill of sale concluded with the statement that the title to the property was fully conveyed and passed absolutely to Green, his heirs and assigns, and was at all times subject to Green's control and disposition. It was recorded October 26, 1889. It was given to secure a debt for supplies furnished and to be furnished by agreement during 1889, to the amount of \$89, due November 1, 1889, and to secure a balance on a note due in 1887. Shepherd remained in possession and worked and gathered the crop, and Green had not taken possession at the time of the levy of Franklin's execution. The execution was levied on October 5, 1889, after the maturity of the crop, on the crop covered by the bill of sale, which was corn and cotton raised by Shepherd on the land; and Green interposed a claim.

The judge, to whom the case was submitted on the above facts, held the property subject, and Green excepted.

COLLEY & SIMS, for plaintiff in error.

No appearance *contra*.

BLECKLEY, Chief Justice.

There can be no doubt that the lien of the judgment would have taken effect upon the crop as soon as the crop matured, if the defendant had not parted with his title before that time. Let it be conceded that the lien of the judgment would never have attached if the conveyance of the crop had not been made as security for a debt but had been made for absolute ownership, then the question arises, what was the effect of not recording the conveyance within the time prescribed by the act of 1885? That act requires that all deeds to realty and bills of sale to personalty, given as security for debt, shall be recorded within thirty days from their date, and declares that if not so recorded, they are postponed to all liens created or obtained prior to the actual record. An exception to this rule is declared with reference to younger liens created by contract where the party receiving such a lien has notice; but there is no exception whatever in the case of liens created by operation of law, whether they be older or younger than the unrecorded conveyance given as security. Acts of 1884-5, p. 124. Here the judgment was obtained in 1887; the conveyance of the crop was made in May, 1889; the crop was levied upon October the 5th, and the conveyance was not recorded until October 26th, 1889. It is admitted that the crop was mature when the levy was made. The lien of the judgment had therefore fully attached before the conveyance was recorded. Under these facts we think the court ruled correctly that the property was subject. The case is unlike *Conder v. Holleman*, 71 Ga. 93, in which the defendant in execution purchased property conditionally and therefore had no title to it on which the lien of the older judgment could attach. Here the de-

pendant certainly did have title at the time he conveyed to the claimant, and the question is whether he had divested himself of that title at the time the levy was made so as to affect his judgment creditor. The solution of this question depends upon compliance or non-compliance with the recording statute of 1885 by the holder of the conveyance. In order for him to be protected in his title acquired from the defendant in the prior judgment, it was necessary for him to have his conveyance duly recorded, if not within thirty days from its date, certainly before the seizure of the property under the execution. The lien of the judgment was inchoate at the time of the conveyance, and became complete and perfect before the recording statute was complied with. See *Cohen v. Candler*, 79 Ga. 427.

*Judgment affirmed.*

96 362  
88 53

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PORTER v. THE STATE.

On the trial of an indictment for using abusive language tending to cause a breach of the peace, it is competent to show in rebuttal to the prisoner's statement (he having stated that he did not abuse the prosecutor, but that they met and parted friendly) that he used other abusive words on the occasion in addition to those alleged in the indictment, and the witness may recite the additional words so used.

December 22, 1890.

Abusive language. Criminal law. Evidence. Before Judge LUMPKIN. Taliaferro superior court. February term, 1890.

Reported in the decision.

J. W. HIXON, for plaintiff in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN.  
*contra.*

BLECKLEY, Chief Justice.

The indictment was under section 4372 of the code,

and the words laid were, "You are a God damned old grey-headed son of a bitch." The evidence for the State established the speaking of these identical words. In his statement to the jury the prisoner said that he did not abuse prosecutor or use the language in the indictment, that they met friendly and parted friendly. In rebuttal to this statement the prosecutor was introduced and was allowed to testify that on the occasion in question the prisoner did curse and abuse him, said he swore a damned lie, go God damn you, etc. It was objected that no abusive language was admissible in evidence save that alleged in the indictment. This might be so if the prisoner had not stated that he did not abuse the prosecutor, and that their interview was friendly. It was in rebuttal to this statement that the prosecutor was allowed to repeat what he said; and for the purpose of contradicting the statement, it was allowable not only to show that the prisoner did abuse the prosecutor, but to recite the language which he employed in so doing. There was no error in refusing a new trial.

*Judgment affirmed.*

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PHELPS v. DANIEL, and *vice versa*.

1. Appeal lies to the superior court from a judgment of the ordinary disallowing objections filed by a creditor to the return of appraisers appointed to set aside and assign a year's support to a minor distributee.
2. Appeal bond need not set out the judgment appealed from, the judgment appearing elsewhere in the record.
3. Amendment of a *caveat* by striking out some of the grounds thereof is allowable in the appellate court, one or more sufficient grounds being left unstricken.
4. A year's support for a minor child of a married woman cannot be assigned out of her estate, upon her death intestate, leaving her husband, the father of the child, surviving. In such case the child and its father take in equal shares by virtue of the act of December 9th, 1871, Code, §1761.

December 23, 1890.

86 363  
106 25

Year's support. Appeal. Ordinary. Bonds. Amendment. Before Judge LUMPKIN. Taliaferro superior court. August term, 1890.

Rebecca Daniel, as next friend of Willie Bird, applied to the ordinary for the setting apart of a year's support to Willie Bird out of the estate of his mother, M. E. Bird. The ordinary appointed appraisers to set aside such support, and they reported that they had set apart \$700 in money. The return was received and citation issued by the ordinary. Phelps, as a creditor of Mrs. Bird, filed a *caveat* on three grounds, one of which was, that Willie Bird is not legally entitled to a year's support out of the estate of his mother, she being at the time of her death a married woman and leaving her husband surviving, who is still in life and is the head of a family and as such legally chargeable with the support and maintenance of his minor child, Willie. This *caveat* was heard at the May term, 1890, of the court of ordinary and was stricken by the ordinary, who allowed the application and admitted to record the return of the appraisers. Phelps appealed to the superior court. In that court the applicant moved to dismiss the appeal upon the grounds that no judgment appeared on the appeal bond from which to appeal, that no issues of fact were passed on, that the ordinary in acting on the matter did and could only act as ordinary and not as the court of ordinary, and only from the decision of the court of ordinary could there be an appeal, and because caveator's remedy was by *certiorari* and not by appeal. Phelps moved to amend his *caveat* by striking the two grounds other than the one above stated. The following facts were agreed upon: Mrs. Bird was the mother of Willie Bird, who is six years old. He and his father survive her. The father has been for several years financially and physically unable to support his child, and has not contributed to his

support. He was living with his wife and child when his wife died. Phelps is a creditor of Mrs. Bird who, at the time of her death, had a separate estate. She executed and delivered to Phelps a mortgage on a tract of land belonging to her estate.

The judge refused the motion to dismiss the appeal, allowed the amendment offered by Phelps, and held that the minor was entitled to the year's support as set apart by the appraisers.

Phelps excepted. By cross-bill exception was taken to the overruling of the motion to dismiss the appeal, and to the allowance of the amendment over objection.

P. L. MYNATT, M. Z. ANDREWS, J. F. REID and J. C. HART, for appellant.

H. M. HOLDEN, *contra*.

BLECKLEY, Chief Justice.

The cross-bill of exceptions is first to be considered.

1. The right to appeal is recognized expressly in the statute by which proceedings for a year's support are provided for and under which they are to be conducted. Code, §2573, Acts of 1884-5, pp. 49, 50. Quite a number of cases have been brought to this court in which the right of appeal was exercised, and we have never before heard the question made. The ordinary certainly acts judicially in allowing or disallowing objections filed to the return of appraisers appointed to set apart and assign the year's support.

2. The suggestion that the appeal is vitiated because no judgment appears in the appeal bond is altogether novel. We have never heard or read that an appeal bond must set out the judgment appealed from. Surely it is enough if the judgment appears in the record.

3. The amendment to the *caveat* which the superior court allowed was only to strike out one or more of the grounds of the *caveat*; and as the code, §3479, expressly

provides that all parties, as matter of right, may amend their pleadings in all respects, whether in matter of form or substance, provided there is enough to amend by, it is plain that there was no error in allowing this amendment. When there is enough in a *caveat* to spare some of it by striking out, and still have a sufficient *caveat* left, there can be no question that there is something to amend by.

The judgment on the cross-bill of exceptions is affirmed.

4. The main bill of exceptions presents a question of some interest: Is the minor child of a married woman entitled to a year's support out of her estate, upon her death intestate, leaving her husband and the child surviving? The law relating to a year's support is a part of the statute of distributions. *Farris v. Battle*, 80 Ga. 187. Until the act of December 9th, 1871 (Acts of 1871-2, p. 48, Code, §§1761, 2484), the law of descent and distribution in this State made the husband sole heir to the wife. The children of the wife, whether minors or not, took nothing under the statute of distributions if she died before the husband. It follows, therefore, indubitably that the statutory provisions for a year's support as now contained in section 2571 of the code did not, when originally passed, contemplate that the minor child of a married woman should be entitled to anything by way of a year's support out of her estate. This section of the code has undergone no alteration since the act of 1871 was passed, but remains just as it previously stood. If, therefore, it has any meaning since the passage of that act which it did not have before, it must be on account of something contained in that act, for there is nothing elsewhere, so far as we know, to vary its former meaning. The title of the act of 1871 is, "An act to change the law of distributions so far as affects the separate property of

married women"; and the body of the act declares: "That on the death of a married woman, intestate, leaving a separate estate, without remainder or limitation over which can and does take effect, who shall leave a surviving husband and child, or children, or descendants of a child or children, such separate estates shall be equally divided, share and share alike, between said husband and said offspring, *per capita*, but the descendants of children shall take *per stirpe*." This is the latest exposition of the legislative will as to how the property of a married woman shall be disposed of upon her death intestate. In the present case there was a surviving husband and one surviving child. The mandate of the statute is express that the estate "shall be equally divided, share and share alike, between said husband and said offspring *per capita*." Were a year's support to be carved out of it for the child by virtue of section 2571 of the code, equality of division to that extent would be departed from; for one object of this section, as has been ruled in *Farris v. Battle*, *supra*, is to distribute to minor distributees more than to their adult co-distributees. It might be very well for the legislature to provide for such inequality as between a surviving husband and the minor children of his deceased wife, but it has not yet done so. On the contrary, as we have seen, its express mandate is that the shares shall be equal. Nor can we recognize an exception in the present case on account of the poverty and physical disability of the husband and father, resulting in his inability to support the minor child. The question is one of statutory construction, depending wholly on the law of distribution as ordained by the legislature; and whatever may be the hardship of a particular case, we must abide by the law as it is written. Neither can we bring the minor within the statutory provisions for a year's support as



against creditors any more than against adult co-distributees. The creditor of a married woman occupies the same footing now as he did prior to the act of 1871. Before that time he could not be excluded by a claim for year's support in favor of the minor children of his deceased debtor, nor can he now be excluded in favor of such a claim. The act of 1871 has changed the position of the husband and children relatively to each other in some respects, but not in respect to a year's support. Nor has it changed the position of creditors relatively to the estate of married women in any respect whatever. It does not even mention creditors, and to affect them by it in any way would be wholly unwarranted.

The court erred in ruling that the minor child was entitled to a year's support out of the mother's estate as against the competing creditor, and in giving judgment accordingly.

*Judgment reversed.*

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ELLIS v. DARDEN.

1. Under the code of Georgia the marriage of a woman revokes a will previously executed by her in which no provision is made in contemplation of such an event.
2. Parol evidence is not admissible to show that the will was executed in contemplation of the marriage.

December 23, 1890.

Wills. Married women. Evidence. Before Judge LUMPKIN. Taliaferro superior court. August term, 1890

This case was submitted to the presiding judge, upon appeal from the court of ordinary, upon the following agreed statement of facts: Louisa Williams, on the first day of January, 1885, duly executed her will, devising all her property to her sister, Mrs. Kent, now Mrs. Ellis. Testatrix signed the will with her maiden name. On the same day the will was executed, and a few hours

86	368
104	853
86	368
115	850
86	368
121	639

after its execution she married one Darden. About five years afterwards she died, leaving her sister and her husband surviving her. Her sister offered the will for probate, and her husband filed his caveat, contending that the marriage of the testatrix to him revoked her will. He had no knowledge of the will until after his wife's death.

The propounder offered to show by parol testimony that the will was executed by testatrix in contemplation of her said marriage. The judge held that the paper propounded was not the valid last will of the deceased, because it was revoked by her marriage with Darden after it was executed; and he declared an intestacy of her estate. He also held that parol testimony would not be admissible to show that the will was executed in contemplation of the marriage. To these rulings the propounder excepted.

H. T. LEWIS and H. M. HOLDEN, for plaintiff.

JAMES WHITEHEAD and M. Z. ANDREWS, by brief, for defendant.

BLECKLEY, Chief Justice.

1. In construing the code it is necessary to bear in mind section 4, which declares that "the masculine gender shall include the feminine." Nothing can be more manifest than that this rule was intended to apply to the provisions of the code on the subject of wills. These provisions are very ample and extensive, beginning with the definition of a will, and embracing the persons capable or incapable of making them, modes of execution, revocation and probate, the property subject to disposition, the different classes of devises and legacies, the office and functions of executors, etc., etc. Code, §§2394-2482. From the first to the last of these sections, with few if any exceptions, the masculine includes the feminine. This is obviously so in the very

first of them, which defines a will to be "the legal expression of a man's wishes as to the disposition of his property after his death." It cannot be doubted that in many of the sections the word "testator" includes testatrix. As to most of the sections in which the word occurs no other construction is possible. See sections 2398, 2400, 2401, 2407, 2413, 2414, 2418, 2420, 2421, 2422, 2479, 2480. Section 2477 reads as follows: "In all cases the marriage of the testator, or the birth of a child to him, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will." We can have no reasonable doubt that the rule that the masculine includes the feminine, applies to this section as well as to so many others touching the subject of wills, and consequently that in sense and meaning, it has the same scope as if it read thus: "In all cases the marriage of the testator or testatrix, or the birth of a child to him or her, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will." This construction only treats the codifiers as governing themselves consistently by their own rule in doing their own work. They undertook to state in a condensed form the law of wills, and they devoted an article consisting of nine sections to the subject of revocation. Can it reasonably be supposed that they intended to be silent upon the effect of marriage on the prior will of a woman? And yet they were silent on that topic unless they dealt with it in the broad general language which we have quoted from section 2477. It is well-known that in hundreds of instances the codifiers did not confine themselves to stating the law as they found it, but that they exercised the function of unifying and harmonizing its various rules and provisions so as to present what they deemed a more consistent and complete system. Their work

as a whole has been adopted by competent authority, and except where altered or repealed, is now the law of the land. We have only to accept it as written and interpret it by a rule found in the instrument itself to arrive at the conclusion that marriage has, in this State, at least as much effect upon a woman's will as upon a man's. There may be more or less reason why revocation should be the result in the one case than in the other, but certainly there is reason enough in either case. At common law the woman's will was revoked but the man's was not. The act of 1834 put a man's will, in this respect, upon the footing of a woman's, with an implied saving in favor of wills in which provision was made for the prospective wife. It also made the birth of a child operate as a revocation of any prior will in which the child was not provided for. Then came the code, in 1863, and after varying the phraseology of the act of 1834 so as to make it wider and more general, incorporated its principle of revocation into the legal system of wills, with an implied saving in favor of wills in which, not the wife or the child, but the event of marriage or the birth of a child was provided for. This implied saving might not hold good as to the wills of women because of other provisions of the code; but that would not hinder the express declaration that marriage or the birth of a child subsequent to the making of a will in which no provision is made in contemplation of such an event, shall operate as a revocation of the will, from having its full affirmative effect upon every will of that class, whether the maker were male or female. It may admit of question whether the code, taken as a whole, intended to save any will whatsoever made by a single woman from revocation by marriage, but this doubt need not affect our construction of section 2477 as to the class of wills which make no provision in contemplation of marriage. Wills of this

kind are expressly declared to be revoked by marriage, though wills of a different kind may or may not be so revoked, according to their standing in the light of other provisions of the code and the general scheme of testamentary law. We can be sure, at any rate, that the code nowhere declares that the will of a woman is not revoked by marriage or by the birth of a child. Thus, no contradiction is involved in our construction of section 2477; and any apparent inconsistency with other provisions of the code which it involves touches a class of wills not now under consideration. Nor did any repeal or modification of the section result from the enlarged testamentary capacity and powers of married women, brought into the law by the act of 1866 and the constitution of 1868 as expounded by this court in the case of *Urquhart v. Oliver*, 56 Ga. 341. If marriage or the birth of a child would work the revocation of a particular class of wills by express statute, when the testamentary powers of a married woman were restricted, we see no reason why such an event should not produce the same effect after those restrictions were removed. Surely marriage or the birth of a child is as great an event in the life of a woman as of a man, and imports as important a change in the testamentary standpoint. It would seem that the more the testamentary powers of the two sexes are equalized, the more reasonable it would be to apply to both alike the provisions of section 2477 of the code. It is a mistake to suppose that this provision, as applied to men, has, or ever had, any purpose to coerce them into the performance of any legal duty which they owe to their families. A man may bequeath his entire estate to strangers. Code, §2399. All legal rights of the wife and family, such as dower and year's support, are as secure against a will made at one time as at another. The object of the provision is to secure a specific moral

influence upon the testamentary act—the moral influence of having before the mind a contingent event so momentous as marriage or the birth of a child, and so deserving of consideration in framing a testamentary scheme. A public policy which rejects the will of a prospective husband or father because it affords no evidence of the presence of this influence, may well reject that of a prospective wife or mother for the same reason. Both are alike free from any legal obligation to provide by will for spouse or child, and both, as a general rule, are equally under the sway of moral motives so to do when these claimants, existing or anticipated, are thought of and their claims duly considered. There is as much reason in requiring one as the other to furnish evidence in the will itself that the testamentary act was performed with the future event of marriage or birth of a child in actual and present contemplation. Now that women, according to the decision in *Urquhart v. Oliver*, *supra*, have substantially the same testamentary freedom as men, the wills of both sexes, whether made before or after marriage, ought to stand on the same footing. It was only on the doctrine of implied repeal of certain statutory restrictions in the code that this court could arrive at the conclusion announced in *Urquhart v. Oliver*. But that conclusion does not require for its completeness or its consistency that section 2477 shall be held not to apply to wills made by women, or that a woman's will should stand on a higher plane than that of a man. On the contrary, the harmony of the whole testamentary system will be better preserved by treating the wills of both sexes alike. When a woman's rights touching the disposition of property are those of a man, her disabilities should also be those of a man.

Basing our decision solely on the statutory system of this State, we rule that the will now before us was revoked by the subsequent marriage of the testatrix,

though it occurred on the same day and within a few hours after the will was executed. A copy of the will is not before us, but we take it for granted, from the argument and from the recitals in the record, that the sole beneficiary under the will was a sister of the testatrix, and that the instrument contained no provision showing that it was made in contemplation of marriage.

How the general question has been treated elsewhere under various shades of statutory provisions will appear from the following authorities: *Loomis v. Loomis*, 51 Barb. 257; *Brown v. Clark*, 77 N. Y. 369; *Fransen's Will*, 26 Pa. St. 202; *Swan v. Hammond*, 138 Mass. 45, s. c. 52 Am. Rep. 255; *Nutt v. Norton*, 142 Mass. 243; *Miller v. Phillips*, 9 R. I. 141; *McAnulty v. McAnulty* (Ill.), 11 N. E. Rep. 397; *In re Tuller*, 79 Ill. 99, s. c. 22 Am. Rep. 164; *Noyes v. Southworth*, 55 Mich. 173, s. c. 54 Am. Rep. 359; *Morton v. Onion*, 45 Vt. 145; *Carey's Will*, 49 Vt. 236; *Ward's Will*, 70 Wis. 251, s. c. 5 Am. St. Rep. 174; *Webb v. Jones*, 36 N. J. Eq. 163; *Fellows v. Allen*, 60 N. H. 439, s. c. 49 Am. Rep. 328; *Emery, App't, in re Hunt's Will*, 81 Me. 275. See also, *Beach on Wills*, §64; 6 *Lawson, Rights, Rem. & Pr.* §3285; 80 Am. Dec. 516, notes to *Young's Appeal*; 1 *Jarman on Wills* (5th Am. Ed.), p. 268 *et seq.*; 3 *Id.* p. 783, n. 19; *Schouler on Wills*, §424; 3 *Washburne on Real Prop.* 575, side p. 698; 1 *Woerner's Amer. Law of Admin.*, p. 107.

2. The parol evidence offered to show that the will was executed in contemplation of the marriage was properly rejected. In order to save a will from revocation by subsequent marriage the will itself must contain the requisite evidence that the event was contemplated. At least, such evidence must appear on the face of some document offered for probate as a part of the will. *Deupree v. Deupree*, 45 Ga. 415. *Judgment affirmed.*

## BROWN v. THE STATE.

A person tried and convicted of a criminal offence is taxable as costs with the fees of two witnesses sworn and examined in behalf of the State, whether they reside in the county or not, and of more than two where their testimony goes to different material points, or where the court certifies that the question at issue was of such a character as rendered more than two witnesses necessary to a single point.

December 23, 1890.

Criminal law. Costs. Before Judge COBB. City court of Clarke county. March adjourned term, 1890.

Brown was convicted of a misdemeanor, and was sentenced to pay a fine of \$50 and all costs of prosecution. On motion to tax the bill of costs, the court ordered that the costs of such witnesses as were sworn and examined on the trial be taxed in the bill. In taxing the costs, the court required Brown to pay fees for four of the State's witnesses who resided in the county both at the time of summons and at the time of trial, which was done under protest. At the following term Brown moved that the bill of costs be revised and re-taxed, and that the sums taxed for witnesses residing in the county be stricken on the ground that said sums were not legal items of costs against him, and for other reasons not here material. The court ruled that Brown was liable after conviction to pay the costs of all witnesses, and overruled his motion. He excepted.

THOMAS & STRICKLAND, by brief, for plaintiff in error.

No appearance *contra*.

BLECKLEY, Chief Justice.

The question is whether a person convicted on indictment for a misdemeanor is chargeable, as a part of the costs, with fees of witnesses sworn and examined for the State unless the witnesses are non-residents of the county in which the conviction takes place. In



the act of December 17th, 1792 (Mar. & Crawford Digest, 230), under the head of jurors' and witnesses' fees in civil cases is found this language: "To each witness per day, for his or her attendance, for coming and returning, allowing thirty miles for a day, not allowing for more than three witnesses, to be paid by the person summoning the same, and taxed in the bill of costs, three shillings and sixpence; the witnesses to have the same allowance in criminal cases where the person prosecuted is found guilty." This provision, so far as we can discover, has never been repealed. It is brought forward in Prince's Digest, 261, and in Cobb's Digest, 353, with the three shillings and sixpence *per diem* translated into seventy-five cents. The code, §3841, declares that when the attendance of any person resident in the county is required as a witness in any court, he shall, on being duly served with a *subpœna*, attend the court from term to term until the case is tried, and that "the witness fee shall be seventy-five cents *per diem*." Until 1836, witnesses residing out of the county, when summoned in behalf of the State in criminal cases, were upon the same footing with reference to compensation as witnesses residing in the county; but by an act passed in that year their compensation was raised to two dollars per day, and so remains. Prince's Digest, 476; Cobb's Digest, 279; Code, §3845. That act expressly provides that "Nothing herein contained shall be so construed as to prevent the cost being collected in the same manner as heretofore pointed out by law from the defendant or defendants in State cases." This provision indicates that it had been previously the practice to collect the fees of the State's witnesses out of convicts according to the fee bill laid down in the act of 1792, *supra*, except that the judiciary act of 1799 (Cobb's Digest, 277), limited the taxable cost to the fees of two witnesses, instead of three, to any material

point. This provision is brought forward in the code, §3682, but qualified with a discretion in the court to certify that the question at issue was of such a character as rendered a greater number of witnesses necessary to a single point. The result of our investigation is that a person tried and convicted of crime is taxable, as the law now stands, with the fees of two witnesses sworn and examined in behalf of the State, whether they be residents of the county or not; and if additional witnesses are required for different material points, two may be counted for each point, and more than two where the court makes the requisite certificate.

The record indicates that questions were made in the court below as to the amount adjudged against the defendant for witnesses' fees, but the only question argued in this court was as to the right to tax fees for resident witnesses at all. That question was correctly decided by the city court, and the judgment is *Affirmed.*

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STATHAM *et al.* v. SHELLNUT.

1. The verdict was warranted by the evidence.
2. The alleged newly discovered evidence being known before the trial, affords no ground for a new trial.

December 23, 1890.

Damages. Evidence. Verdict. Before Judge HUTCHINS. Jackson superior court. February term, 1890.

Reported in the decision.

W. I. PIKE and J. B. ESTES, for plaintiffs in error.

J. A. B. MAHAFFEY and J. W. AUSTIN, *contra.*

BLECKLEY, Chief Justice.

This was a civil action for damages founded upon the same outrage involved in *Statham et al. v. State*, 84 Ga. 17, and in *Statham v. State*, decided at the present

term (*ante*, 331). The suit for damages, however, omitted two of the accused persons in the criminal proceeding, to wit, Joseph Statham and Andrew Martin, and included the wife of M. J. C. Statham, who was not embraced in the criminal prosecution. The jury found in favor of Shellnut, the plaintiff, \$1,600.00. Statham and wife, who alone defended, moved for a new trial, and their motion was overruled.

1. That the verdict was warranted by the evidence we entertain no doubt. Although Statham and wife were not present when Shellnut was seized, hanged and whipped, the circumstances strongly indicate that they were parties to the conspiracy and promoters of the outrage. It was upon this theory alone that they were sought to be made liable, and the jury could not have found against them without being of opinion that the theory was sustained by the evidence. We are content, as was the court below, to accept the decision of the jury on that question. It was matter for reasoning and inference from all the circumstances in proof, and these circumstances furnish ample premises from which to draw the conclusion at which the jury arrived.

2. The ground of newly discovered evidence is wholly unsustained by the affidavits in the record. The trial took place at August term, 1889, and there is no affidavit by party or counsel that the facts sought to be brought in as newly discovered were not known previously to the trial. On the contrary, that they were known is manifest, for the affidavit of one of the witnesses bears date May 4th, 1889, and it was admitted in the argument before us that there was no mistake in this date. Not only does this affidavit set forth the facts now claimed to be newly discovered, but it gives the names of divers persons besides the maker of the affidavit to whom the facts must have been known and by whom it must be assumed they could have been

established. The record furnishes no excuse or explanation as to why these witnesses, or some of them, were not produced at the trial. A more flimsy and frivolous application for a new trial on the ground of newly discovered evidence we have never known; and were this the sole ground of the motion, we should unhesitatingly award damages for bringing the case to this court. There was no error in denying the motion.

*Judgment affirmed.*

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BOYD v. WILSON *et al.*

1. The levy of a tax *fi. fa.* describing the property seized as " $\frac{1}{4}$  of lot No. 931, in the 12th Dist. and 1st section of Lumpkin County, Georgia," is sufficiently definite and certain, the meaning of the same being not any particular fourth, but one fourth of the lot undivided.
2. The year for redemption of property sold for taxes runs from the date of the sale and not from the time when the sheriff's deed is recorded.
3. A purchaser at a tax sale duly made under a legal levy, who is neither implicated in nor aware of any fraud contemplated by the selling officer, is not affected thereby.

December 23, 1890.

Levy and sale. Tax-executions. Redemption. Fraud. Before Judge WELLBORN. Lumpkin superior court. April term, 1889.

After the former decision of this case as reported in 84 Ga. 34, Boyd amended his bill by these allegations: When the sheriff exposed Boyd's land for sale, he had already levied upon and advertised for sale on that day a large amount of Parker's property under five justice court *fi. fas.* which were in the hands of Price & Charters, attorneys at law and relatives of Wilson. Had the sheriff sold the lands thus levied on, in the order in which he had advertised them, he would have realized enough to have paid off all the *fi. fas.* in his hands, together with the tax *fi. fa.* under which he sold Boyd's

86 379  
123 622

land to Wilson ; but the sheriff fraudulently postponed the sale of the lands levied on under the justice court *fi. fas.*, for the sole purpose of reaching Boyd's property and subjecting it to the payment of Parker's debt, because the sheriff was personally interested in one of the *fi. fas.* The levy of the tax *fi. fa.* is void, because it does not plainly describe the property levied upon, nor the amount of the interest of Parker therein, nor does the advertisement by the sheriff give such description. In January, 1890, Boyd tendered to Wilson the amount of his bid, \$1.50, together with ten per cent. interest thereon, to indemnify him against any loss because of the illegal and fraudulent sale, and such tender was made in good faith, and is a continuing tender.

Wilson answered that the other property mentioned was advertised for sale under other process than the tax *fi. fa.*; that such other process may have been in the hands of Price & Charters, though Wilson had no notice of it and no knowledge of it, but it is untrue that he and Price & Charters, or either of them, conspired in any way to postpone such other sales; on the contrary, Wilson never spoke to either Price, Charters or the sheriff about his intention to buy the land in question, nor did he in fact intend to buy it up to the very moment it was exposed for sale; that he happened at the sale by accident, did not even know that this land was going to be sold, and the only reason he bid at all was because the bidding was so low. He asserts that the levy of the tax *fi. fa.* sufficiently described the property and showed the interest of Parker. He declined the tender made in the amended petition ; and asserted that if Boyd ever had any title to the property it had become void, because the property had been sold to Wilson under the tax *fi. fa.*, and Boyd had not redeemed it within the time allowed by law.

On the trial Boyd introduced the *fi. fa.* of Sears against Parker under which the property in question was sold on November 2, 1886, with the entries thereon, and the sheriff's deed made to Boyd in pursuance of the sale, and recorded on January 18, 1887. Also the tax *fi. fa.* under which the land was sold to Wilson on the first Tuesday in April, 1887, the levy, dated February 24, 1887, being "on lots of land Nos. 1103, 311, and  $\frac{1}{2}$  of lot No. 931 in the 12th Dist. and 1st section of Lumpkin County, Georgia, as the property of John A. Parker, pointed out by the said Parker"; and the deed from the sheriff to Wilson in pursuance of the sale under this levy, dated June 16, 1887, and recorded August 24, 1888. This *fi. fa.* also contained an entry of levy, on May 6, 1887, on other property of Parker, and of sale of the same on June 7, 1887, for an amount sufficient to extinguish the balance due and leave \$14.51 to be applied to other *fi. fas.* in the sheriff's hands. Also the sheriff's advertisement of sales for the first Tuesday in April, 1887, in which the notice of intention to sell the land levied on under the justice court *fi. fas.* preceded that as to the land in question; and the sheriff's advertisement of postponed sales for the first Tuesday in June, 1887, which was an advertisement of intention to sell the land levied on under the justice court *fi. fas.* One of these was against Parker as principal, and others (including the sheriff) as guarantors. Soon after Boyd bought the property he leased it to one who took possession and worked the land for gold in the spring of 1887 and a good while before it was sold under the tax *fi. fa.* At the sale under this *fi. fa.* Boyd was present, and gave notice to all bidders that he had bought it at a previous sheriff's sale and had paid for it and was in possession. When the property was put up only two bids were offered, one by Charters of \$1, the other by Wilson of \$1.50, and it

was knocked off to Wilson. Neither at that time, nor for a long time afterwards, did Boyd think that Wilson intended to assert any serious claim to the lot; he asked the sheriff twice if he had made a deed to Wilson, and the sheriff always replied that he did not remember whether he had or not. Boyd did not know that Wilson's claim would be insisted upon until Wilson's deed was put on record.

For the other facts see the opinion.

M. G. BOYD, by HARRISON & PEEPLES, for plaintiff.

PRICE & CHARTERS, by brief, for defendants.

BLECKLEY, Chief Justice.

After a previous writ of error in this case was disposed of (*Wilson v. Boyd*, 84 Ga. 34, 10 S. E. Rep. 499), the case was tried again in the court below and resulted in a nonsuit, to the granting of which Boyd, the plaintiff, excepted.

1. The first question now to be considered is whether the levy of the tax *fi. fa.* upon the property in controversy is sufficiently certain and definite. The deed made by the sheriff to Wilson, the purchaser at the tax sale, described the property as "all that tract or parcel of land situate, lying and being in the twelfth district and first section of Lumpkin county, and known as the undivided one fourth of number nine hundred and thirty-one, containing in the whole lot forty acres, more or less," whereas the levy and sheriff's advertisement both described it thus: " $\frac{1}{4}$  of lot No. 931, in the 12th Dist. and 1st section of Lumpkin County, Georgia." The point made is that the description in the levy and advertisement does not sufficiently indicate that one fourth of the lot undivided was seized and advertised. We think the description signified this and could signify nothing else. It did not specify or indicate any particular fourth of the lot, and if it would apply as well to one fourth as another it could not have been

intended to point out or designate any particular fourth. There is nothing, therefore, for it to signify but some part of the lot in an undivided state, and that part is definitely indicated as one fourth, neither more nor less. In *Coke upon Littleton*, vol. 2, 190 (b), it is said: "Also, if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignment or limitation of the same moiety in severaltie at the time of the feoffment, then the fesse and the feffor shall hold their parts of the land in common. And the like law is, if the feoffment be made of a third part or a fourth part, &c." In *Adams v. Frothingham*, 3 Mass. 352, it was held that a conveyance of a moiety of a piece of land in quantity and quality creates an estate in common. But it would seem from the language of *Littleton* quoted in the above passage that the words quantity and quality in this description were superfluous. And see *Lick v. O'Donnell*, 3 Cal. 59, cited in *McAfee v. Arline*, 83 Ga. 645. In *Keaton v. Forrester*, 63 Ga. 206, the decision was put by this court, not upon the insufficiency of the levy, but upon the failure of the evidence to establish title or possession in the defendant *in fi. fa.* so as to change the *onus*.

We think what we have held above is correct, but suppose it to be incorrect as a general rule of law, and so it would be perhaps tested by the case of *Ronken-dorff v. Taylor*, 4 Peters, 348, yet under the special facts of this particular case we think neither Parker nor Boyd could complain as against Wilson of any ambiguity in the levy and advertisement. Parker was the tax debtor, and the property was levied upon, advertised and sold as he pointed it out to the levying officer. Boyd was present at the sale and understood that the same undivided fourth of the lot which he had purchased at a previous judicial sale was being again sold. He gave notice of his prior purchase, but made no objection to the terms of the levy or advertisement



under which the second sale was proceeding. His failure to do so indicates that he then construed the levy and advertisement as we do now; and no doubt Wilson, the bidder and purchaser at the tax sale, understood, as Boyd did, that the property being sold was the same which Boyd had previously purchased. This matter of ambiguous description seems to have been an afterthought. It was not even suggested in this case until after the first trial. On the contrary, the theory of the plaintiff was that the interest of Parker sold for taxes was the same interest which Boyd had previously bought, namely an undivided fourth of the lot.

2. The next question is as to whether the tender to redeem from the tax sale was within time, it having been made after the expiration of twelve months from the time of the sale but within twelve months after the sheriff's deed to the purchaser was recorded. The code settles this question in section 898, which reads as follows: "Whenever any land is sold by virtue of a tax execution issued under this code, the owner thereof, or any administrator, executor, or guardian, or other trustee of the defendant in execution, shall have the privilege of redeeming said land thus sold within one year by paying the purchaser the amount paid by said purchaser for said land, with ten per cent. premium thereon from the date of the purchase to the time of payment." Certainly there is no hint or intimation that the time is to be computed from the recording of the deed. Manifestly the time of the sale is the point from which the limitation runs.

3. The fraud set up in the amended petition was not proved so as to affect the purchaser at the tax sale. He had no part or lot in it. So far as he was concerned the sale was legal; and he made his purchase fairly and openly. The object of the bill is to set aside and annul his title. The facts of the case, as they appear in the record, do not furnish any valid ground for so doing.

We have already ruled that although he paid but a small price, yet, if he purchased fairly at a legal sale, he was entitled to take the benefit of his purchase. We see nothing in this second appearance of the case before us to warrant a court, or a court and jury, in branding this purchase as fraudulent or otherwise invalid. Tax titles are protected by the code equally with those depending on sales made under judgments of the superior court. Code, §884. The pointing out of property to be levied upon under tax executions is governed by section 891, and not by section 3641, of the code.

There is no error in any of the assignments contained in the bill of exceptions, nor in the judgment of nonsuit.

*Judgment affirmed.*

On January 17, 1891, before the above judgment was made the judgment of the superior court, Boyd petitioned for a rehearing in the Supreme Court, on the ground that the first specific assignment of error in his bill of exceptions was not decided by that court, and that the same, together with the facts connected therewith, must have been overlooked, else the exception would have been sustained. This exception was, that the superior court erred in sustaining the levy of the tax *fi. fa.* when it appeared, both by the levy itself and by the other evidence, that Parker pointed out said property when he was not in possession of it, and when it further appeared that there was amply sufficient other property in the possession of Parker to have made the money due on the tax *fi. fa.* The petition invoked the application of section 3641 of the code.

*Per Curiam.* Petition for rehearing denied, this court having already decided in the same case that section 891 of the code applies to pointing out property under tax executions. See 84 *Ga.* p. 36. Section 3641 of the code applies, not to tax executions, but to executions founded on judgments.

## ROBERTS v. GORDON, governor.

Upon a recognizance for the appearance of the principal to answer the charge of assault and battery and not depart without leave of the court, the bail is not bound for the appearance of the principal at a term of the court subsequent to that at which he was tried, convicted and sentenced. After sentence the bail was not entitled to the custody, but the legal custody was, or should have been, in the sheriff.

December 23, 1890.

Recognizance. Criminal law. Bonds. Before Judge GOBER. Cherokee superior court. February term, 1890.

Reported in the decision.

AKIN & HARRIS, for plaintiff in error.

GEORGE R. BROWN, C. D. PHILLIPS and HARRISON & PEEPLES, *contra*.

BLECKLEY, Chief Justice.

By the terms of the recognizance it was to be void on condition that the principal should appear at the next superior court "from day to day and from term to term, then and there to answer for the offence of assault and battery . . . and shall not depart thence without the leave of said court." There was no stipulation to abide any final order or judgment of the court. The principal appeared at the February term, was tried and found guilty, and the court pronounced final judgment, the sentence being that he should pay within three days a fine of forty dollars and all costs and then be discharged, or in default of such payment, that he work in a chain-gang on the public works for the term of six months. The fine was not paid, nor did the convict undergo the sentence with respect to labor, etc. After being sentenced he left and did not return. At the next term of the court, being November term, he was called and did not appear, whereupon a judgment *nisi* declaring a forfeiture of the recognizance was entered

of record. A *scire facias* was issued upon this judgment to fix the liability of the bail. On the trial thereof the court charged the jury in effect that the bail was not discharged, but remained liable, although the principal had been convicted and sentenced.

In view of the terms of the recognizance, we think this charge was erroneous. With us such undertakings are construed strictly in favor of the bail or surety. *Colquitt v. Smith*, 65 Ga. 341. In *Dennard v. State*, 2 Ga. 137, this court, in construing a similar instrument, said: "We hold that this bond binds the principal not only to be and appear at the term to which it is returnable, but to continue to appear until acquitted or in some legal way discharged, or if tried and found guilty, until the sentence of the court is passed upon him, unless he is permitted to depart sooner by leave of the court had." And see 2 Am. & Eng. Encl. of Law, 32. There can be no doubt that as soon as the sentence was pronounced, the sheriff, and not the bail, was the proper custodian of the convict. The legal effect of the sentence was equivalent to a special order directing the sheriff to hold him in custody. This being so, it was not necessary to enter an *exoneretur* on the minutes of the court in order to discharge the bail. The sentence itself operated as an *exoneretur*. *The Governor v. Kemp*, 12 Ga. 466. The allowance to the convict of three days within which to pay the fine was no permit for him to go at large in the meantime. Even if so construed, unless the bail had assented to it, he could not be affected thereby, since by the general law (Code, §4655) all fines are payable immediately unless the court shall grant further time. By analogy to the case of an ordinary creditor, the grant of further time, without the consent of the bail or surety, would discharge him. But we do not put the case upon this ground. The default of appearance, on which the judgment of forfeiture *nisi* was passed and for which

the *scire facias* proceeds, was at a term of the court subsequent to the term at which the principal was sentenced. The bail was not bound by the stipulations of the bond for the appearance of his principal at any time after final sentence. He might have been so bound if he had stipulated that his principal should abide the judgment of the court. Such was the stipulation in *The State v. Whitson*, 3 Blackf. 178.

The charge of the court being erroneous and having led to a wrong result in the verdict, there must be a new trial, unless the *scire facias* shall be dismissed by the solicitor-general.

*Judgment reversed.*

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THE EAST TENN., VA. & GA. RAILWAY CO. v. SUDDETH.

1. That the company furnished its employee with a lamp which became extinguished whilst the latter was making a signal with it in the usual way, raises no presumption that the company was negligent.
2. That the employee, whilst passing in the course of his duty over a car loaded with ore, stepped upon a piece of the ore, which turned under his foot, whereby he was precipitated from the car and severely injured, is evidence of injury by accident rather than by any fault or negligence of the company. That the car was loaded by heaping up the ore at each end, leaving a depression in the middle, affords no suggestion of unusual or improper loading.
3. Where the alleged injury was in one county and the suit was brought in another, and these facts appeared on the face of the declaration, appearance and pleading to the merits, without objecting to the jurisdiction, waived the objection; and the question could not be raised at a subsequent term by withdrawing the plea and moving to dismiss the action for want of jurisdiction.

December 23, 1890.

Railroads. Master and servant. Negligence. Jurisdiction. Practice. Waiver. Before Judge MILNER. Gordon superior court. February term, 1890.

Reported in the decision.

BACON & RUTHERFORD, MADDOX & LONGLEY and DORSEY & HOWELL, for plaintiff.

J. C. FAIN and O. N. STARR, for defendant.

BLECKLEY, Chief Justice.

1. Not even the faintest tinge of a presumption was raised against the company in respect to the lamp. On that subject the plaintiff testified as follows: "After setting switch, I signalled the engine ahead. This is done by raising lamp up and down. This I did in the usual way. In making signal my lamp went out. Defendant furnished me with this lamp; it was in the caboose when I went to work." The only act of the company proved by this testimony is the furnishing of the lamp. Who filled it with illuminating material, trimmed it and lighted it, does not appear. Nor does it appear what caused it to become extinguished in the act done by the plaintiff himself of moving it up and down in making the signal in the usual way. There is no suggestion that the lamp was of poor quality, or that there was any defect in its construction, or any failure to supply proper materials with which to keep it lighted. As the plaintiff was charged with the custody and use of the lamp, it was certainly his duty to keep it in a condition for safe use, in so far as the quality of the lamp and the materials supplied would enable him to do so. Whether he performed this duty or not, his testimony gives no hint. He was no less unhurt after the lamp went out than he was before, so that the going out of the lamp did not cause the physical injury for which his action is brought. Even if it had done so, it would not have raised any presumption against the company, unless he had proved himself free from fault in all the dealings with the lamp which devolved on him. *Central R. R. v. Kenney*, 58 Ga. 485.

2. The plaintiff evidently regarded the lamp as in a fit condition to be relighted; for to relight it at the engine was his purpose when he climbed upon the train and commenced going forward over the tops of the cars to reach the engine. Why the more simple and ready

resource of striking a match was not available, does not appear, except inferentially. He says nothing about having no matches; but this was probably the case, inasmuch as he started to the engine to obtain the means of relighting. In passing over the cars in the dark, he sustained the injury, and the next question is whether the evidence establishes any negligence of the company in loading the car from which he fell. On that subject he testified as follows: "The car next to the box-car was loaded with iron-ore, and there were three or four flat cars ahead loaded with lumber. The car loaded with iron-ore was what is called a dinkey. It is a short car with one set of trucks to each end, that is to say four wheels. It is a regular ore-car. The ore was piled up at the ends of the car because of there being only one set of trucks, and it was not full in the middle. I had never seen the car or noticed it on the train. The train was made up in Rome by the yardmen. I got down from the box-car I was on, after setting up one brake, passed to the north end of the car loaded with the ore, put my left foot down and was in the act of stepping across to the other car, when the piece of ore under my left foot turned and I fell off the car; and I fell between the cars and my leg was cut off." Another witness, introduced by plaintiff, testified as follows: "This car was a regular ore-car. It is short. I have seen lots of them. They are usually loaded by piling up the ore on them. Being short, you have to do this in order to get a load on them." It seems to us that there is no suggestion in this testimony that the car was loaded in an unusual or improper manner. Granting that the plaintiff was free from fault in all he did, his own testimony and that of his witness screened the company by pointing out mere accident rather than the fault of any one as the cause of the injury. While the general rule is that the com-

pany must explain where the fact of injury is proved and the plaintiff shows himself free from fault, yet where he is the only employee who directly participates in the act resulting in the injury, and where the evidence which goes to make out his case points distinctly to accident, rather than to any negligence whatever on the part of the company or its employees, it would seem unreasonable to apply the general rule. Why should the company be required to prove itself free from fault, when the evidence for the plaintiff fails even to suggest any fault whatever against it? The car was an ordinary ore-car loaded by heaping up the ore at the ends. It was usual to heap up the ore in such cars. And the plaintiff's evidence suggests a reason why the heaping should be done at the ends, namely, because the cars have a style of trucks which would render the ends capable of supporting a heavier weight than the middle. Although this particular car was taken on at Rome in the night and the plaintiff had not seen it before he undertook to pass over it, yet he does not profess to have been unacquainted with that kind of cars or with the usual manner of loading them with ore, nor does he or his witness state that this car was loaded in an unusual way. On the contrary, the fair inference from their testimony as above recited is that the loading was such as was usual and as the plaintiff might have had reason to expect. His fall was caused by the turning of one piece of the ore under his foot. *Prima facie*, such an occurrence is a mere accident. It was an accident that he stepped on that particular piece of ore, and an accident that it turned under his foot. Such casualties, it seems to us, appertain to the risk of the service in which the plaintiff was engaged. *Lee v. Central R. R.*, this term. 86 Ga. 232.

3. Had the defendant's motion, made at the third term, to withdraw the plea which it had filed at the



first term to the merits, been granted, the defendant would have been in no condition to move to dismiss the case for want of jurisdiction. Pleading to the merits without pleading to the jurisdiction, and without excepting thereto, admits the jurisdiction of the court. Code, §3461. The declaration showed on its face that the injury complained of was done in Floyd county. The defendant was obliged to take notice of that allegation before pleading to the merits, and consequently the suggestion that the plea was filed inadvertently, is without efficacy. Parties must be held to full diligence in taking notice of facts which appear on the face of the pleadings.

For error in refusing a new trial upon the merits of the case, the judgment is *Reversed*.

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WATTS v. STARR *et al.*

Though declarations made out of court by a witness may be used to impeach the witness, they cannot be treated as substantive evidence to establish the facts which they affirm; and a charge of the court so treating them, whether expressly or by necessary implication, is erroneous. Such a charge is vicious as based on an assumed state of facts, where this class of declarations is the only evidence to which it could apply.

December 23, 1890.

Ejectment. Evidence. Witness. Impeachment. Charge of court. Before Judge MILNER. Gordon superior court. February term, 1890.

Ejectment was brought upon the demise of James A. Watts as sole heir of John C. Watts. The defendant obtained a verdict, and the plaintiff moved for a new trial. The motion was overruled, and exceptions were taken. For this report it is sufficient to state three grounds of the motion, to be taken in connection with the statements in the decision:

The plaintiff based his right to recover the land sued

86	392
90	400
86	392
96	403
86	392
105	164
86	392
110	381
86	392
125	87
126	113

for on the facts that James Watts executed and delivered to John C. Watts, in January, 1862, a deed conveying the land to him, and that John C. Watts immediately went into possession and occupancy of the land with his family, consisting of his wife and plaintiff, his only child, an infant, claiming the same as his own, and died while in said possession and occupancy, leaving his wife and child as his only heirs at law, who continued in the use, occupancy and possession of the land until the death of the wife not long thereafter, whereby the plaintiff became the sole heir and owner of the land, and by his friends, agents and tenants, continued in such actual possession and occupancy until the defendant obtained possession under a sheriff's sale in July, 1885. The court admitted, over objection upon the ground of irrelevancy, parol evidence of a deed from Chandler to Deliza Watts, wife of James Watts, and from her to C. P. and W. R. Kiker, and the cancellation of the trade and turning the papers back to her, to impeach the witnesses James Watts and Deliza Watts, who had been examined by plaintiff, and then so instructed the jury as to allow them to consider said evidence and the possession of the parties thereunder, and whether Deliza Watts purchased the land with her separate funds derived from her father's estate, for the purpose of sustaining the defence.

The court charged: "You will look to all the evidence which the court has admitted as competent evidence for your consideration in determining the issue as to whether James Watts, in 1862, made and delivered his deed to his son, John C. Watts, conveying to him the land in dispute, under which John C. Watts went into possession thereof. There is no such deed in evidence before you in writing. It is alleged that the deed was destroyed. You will, therefore, look into the evidence which the court has admitted as secondary evi-

dence tending to show that such a deed ever existed, that it was properly executed, conveying the land in dispute to John C. Watts, and delivered to him. Does the evidence show that such a deed was executed by James Watts in the presence of witnesses, and does the evidence show that the deed was delivered by James Watts to John C. Watts?" The court had admitted in evidence a deed made by James Watts, as agent for Deliza Watts, to C. P. and W. R. Kiker, for the purpose only of impeaching them; and the error alleged in this charge is, that it submitted to the jury, without qualification or distinction, all the evidence that had been admitted, of which the deed above referred to was a part, to be considered by them in determining the issue as to whether James Watts, in January, 1862, made and delivered his deed to John C. Watts for the land sued for, and did not restrict the jury to the consideration of said evidence only as it might affect the credit or weight of the evidence of James and Deliza Watts, and not to consider it as showing ownership or title in Deliza Watts, under whom the defendant claimed by purchase at sheriff's sale, or any right in them to dispose of the land as the property of said Deliza Watts.

The court charged: "If you find from the evidence that the deed was made by James Watts conveying the land to John C. Watts, and that John C. Watts went into possession thereof, and afterwards that trade was cancelled and the deed given back to James Watts and that he burnt it, the destroying of the deed would not legally convey the land back to James Watts; but if you find that James Watts, at the time the deed was given back to him, returned the purchase money notes which John C. Watts had given him for the land, should you find that such notes were given, then the delivery of the note and destruction of the deed would in equity leave the title in James Watts. And if John C. Watts

died after this transaction, he did not die seized and possessed of the land; and the plaintiff would not be entitled to recover." Error, because unauthorized by evidence.

W. R. RANKIN, J. A. JERVIS and DABNEY & FOUCHÉ,  
for plaintiff.

O. N. STARR and R. J. & J. McCAMY, for defendants.

BLECKLEY, Chief Justice.

The plaintiff is clearly entitled to a new trial, because the court charged the jury on an assumed state of facts. There was no evidence of any sale of the land to John C. Watts, the plaintiff's father, or that any notes for the price were given, or that any contract of sale was made or cancelled or that notes for the price were returned and the deed given back. What any person other than the plaintiff or his father may have said on these subjects, was not evidence to affect him, nor was it evidence at all except as bearing on the credibility of witnesses. The court tacitly treated the mere declarations of a witness as evidence by which as declarations or admissions the plaintiff's title could be directly affected. This was a grave error. All the testimony applicable to the real nature of the conveyance by James Watts to John C. Watts tended to show that the deed made was a deed of gift, not a conveyance founded on a valuable consideration. There was nothing whatever to show that there was any purchase or purchase price, or that any notes were given or returned, nor was there any evidence tending to show that the deed was given back to James Watts. On the contrary, he found it among the papers of John C. Watts after the death of the latter, and of his own will took it and destroyed it. If this deed of gift was made and delivered by James Watts with the consent and approbation of his wife, these two being the father and mother of John C.

Watts, and if John C. accepted the gift and entered into possession under the deed and died while in possession, he was the owner of the land as against both his father and mother, and neither of them could afterwards divest his title by abstracting the deed from his papers and destroying it. John C. Watts having died intestate, the title would descend to his wife and child as his heirs at law, and the plaintiff being that child and his mother having died intestate, leaving him surviving as her heir at law, he would have the whole title. If this is the truth of the case, he is entitled to recover *prima facie*; and to defeat him, some defence to the action must be established that affects him, that is, that shows that he has lost the title with which he was once clothed.

The court erred in not granting a new trial.

*Judgment reversed.*

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YARBOROUGH v. THE STATE.

1. The husband is head of the house though the ownership be in the wife. Where both reside together in a house belonging to her, it may be described as his house in an indictment for burglary.
2. To declare the law applicable to a given state of facts, is no expression or intimation of opinion as to whether any of the facts referred to do or do not exist in the case on trial.
3. Where both burglary and larceny from the house are charged in the indictment, a general verdict of guilty convicts the accused of burglary, and whether the larceny be proved or not is immaterial.

December 23, 1890.

Burglary. Indictment. Criminal law. Charge of court. Larceny from the house. Husband and wife. Before Judge MILNER. Bartow superior court. July term, 1890.

Reported in the decision.

J. A. BAKER, by brief, for plaintiff in error.

A. W. FITE, solicitor-general, *contra*.

BLECKLEY, Chief Justice.

The indictment charged both burglary and larceny from the house. The house was alleged to be the dwelling-house of B. T. Leake, and the breaking and entering were charged to be with intent to steal the goods and chattels of said B. T. Leake. The indictment then proceeded to allege a felonious stealing from the house of a locket of the value of \$10, the property of Mattie Leake. The verdict was a general finding of guilty.

1. The evidence as to the ownership of the house was that: "B. T. Leake has everything in his wife's name. His wife claimed the house as her own, but they both lived in it together, and the witness, their daughter, did not know whether her father claimed it or not." The court charged the jury on this subject as follows: "On the question of ownership, the court will charge you that if the proof in this case shows that B. T. Leake occupied this house, lived in it with his wife and family, at the time of the commission of this offence charged in the indictment, then that is sufficient to support the charge of burglary. You look to the proof and see how that was, see whether or not he occupied the premises, whether he lived on the premises. It is not material whether he held under Mrs. Leake or any one else; if he occupied the premises and was in possession of the premises, it was such ownership as would protect him from burglary." The court refused to charge a written request presented by the counsel for the accused as follows: "If B. T. Leake occupied the house mentioned in the bill of indictment not in his own right, but in the right of another and so claimed, and that other also, at the same time, occupied the house, then that would not be such proof of ownership as would support this bill of indictment." We think there is no doubt that when a married man occupies a dwelling-house with his family, he,

being the head of the family, is considered by the law as having such ownership and possession as to make the house his for all purposes connected with an indictment for burglary. It matters not whether he holds under his wife or some other person. *Harrison v. The State*, 74 Ga. 802. It may be also that the property in the house could be laid in the wife, she being the actual owner. *Goode v. The State*, 70 Ga. 755. We see no reason why premises occupied jointly by landlord and tenant might not be charged to be the property of either. However, where husband and wife reside together, whatever else she may be the head of, he is the head of the house. *Morgan v. The State*, 63 Ga. 307; *Primrose v. Browning*, 59 Ga. 71; *Neal v. Perkerson*, 61 Ga. 354; Code, §1753.

2. It is contended that the court expressed or intimated an opinion upon the facts in the charge which we have quoted above. But this seems to us a strained construction. To say that such and such an ownership would protect against burglary, does not imply any opinion in the speaker that a burglary has been committed. No proposition of law can be laid down without some implication of a state of facts as by possibility existing; and merely to declare the law respecting any state of facts whatever is to express an opinion irrespective of the actual existence of such facts in the given instance.

3. As the conviction was for burglary, the higher crime charged, it matters not whether the alleged larceny was proved or not. *Bulloch v. The State*, 10 Ga. 48. It follows that the criticism that the property stolen is described as a locket in the indictment and called a necklace in the evidence, has no materiality. But the truth is that the evidence describes it by both names, the witness saying she left a gold necklace on the bureau, that she laid that locket "on there" that

night when she retired, and missed that locket the next day, etc.

There was no error in refusing a new trial, and the sentence of five years in the penitentiary was not excessive.

*Judgment affirmed.*

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ALLEN v. THE STATE.

86 399  
•119 280

1. By the code, §414, larceny from the house of anything under the value of \$50 is a misdemeanor only; while, by section 4406, simple larceny, where the property stolen is a note, due-bill, bank-bill, or any paper for the payment of money or other valuable thing, is a felony. It follows that a person indicted and tried for larceny from the house on a charge of stealing in a house 'one five-dollar bill of the value of five dollars,' cannot be convicted of simple larceny.
2. The indictment and trial being for a misdemeanor, and the verdict being for a felony, judgment will be arrested on motion.

December 23, 1890.

Larceny from the house. Criminal law. Indictment. Verdict. Before Judge MILNER. Gordon superior court. August term, 1890.

Reported in the decision.

E. J. KIKER, R. J. & J. McCAMY, for plaintiff in error.  
A. W. FITE, solicitor-general, *contra*.

BLECKLEY, Chief Justice.

The penal code is in an unfortunate condition with respect to its provisions on the subject of larceny. By section 4414, larceny from the house of any "goods, money, chattels, wares or merchandise, or any other article or thing, under the value of fifty dollars" is punishable as a misdemeanor only, the penalty being that prescribed in section 4310. By section 4406, simple larceny, where the property stolen is a note, due-bill, bank-bill, or any paper securing the payment of money or other valuable thing, is punishable as a felony by imprisonment in the penitentiary from one to four



years. The stealing of a bank-note for one dollar outside of any building or structure is a felony, whilst stealing from a house anything whatever under the value of \$50 is only a misdemeanor. Worse still, according to the code as it now stands, the stealing of a million of dollars in gold or silver, lying loose out of doors, would be a mere misdemeanor, no punishment being prescribed for it save that laid down in section 4310, and this would be reached by virtue of section 4409, under the phraseology "all simple larcenies or thefts of the personal goods of another, not mentioned or particularly designated in this code." The larceny of paper money, under the description of bank-bills, notes, etc., is mentioned and particularly designated, but not the larceny of metallic money or of money generally, unless the larceny is committed in a house, etc., or from the person.

1. The indictment in this case was for larceny from the house, and the property stolen was described as "one five-dollar bill of the value of five dollars." The court charged the jury that if they found the accused did not take it from the house as charged in the indictment, but that he feloniously took it outside of the house with intent to steal, then under this indictment they could find him guilty of simple larceny. This was the verdict rendered. The charge of the court was clearly erroneous. The ordinary meaning of a five-dollar bill is a bank-bill for the payment of five dollars. And certainly no meaning for such a description could be found that would not make it signify a bank-bill, a note, due-bill, or some paper securing the payment of money or other valuable thing. Any of these instruments would be comprehended in section 4406, if the stealing was simple larceny, and the punishment for the offence would have to be imprisonment in the penitentiary. But the indictment was for stealing a five-

dollar bill in a house, and consequently the offence charged was a misdemeanor, and the trial of it would have to be conducted, with reference to the number of challenges allowed and in all other respects, accordingly. The accused, upon such an indictment, could not undergo the jeopardy of a conviction for felony, and he certainly could not be convicted of an offence touching which he was in no jeopardy.

2. Nor could the court sentence the accused upon the verdict found to any punishment whatever. He could not be sentenced for a misdemeanor, because he was not convicted of it. He could not be sentenced for a felony, because he was not indicted for it. The result is that the court erred not only in charging the jury, but in denying the motion made in arrest of judgment.

*Judgment reversed.*

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### BENNETT v. THE STATE.

Although when no evidence as to the prisoner's character has been introduced, his counsel argues that his character and reputation are good, it is reversible error to allow the State's counsel to argue in reply, over objection, that as the prisoner has not introduced such evidence, it must be because he has no such reputation.

December 23, 1890. Argued at the last term.

Practice. Trials. Argument of counsel. Before Judge LUMPKIN. Hart superior court. September adjourned term, 1889.

Reported in the decision.

McCURRY & PROFFITT, for plaintiff in error.

W. M. HOWARD, solicitor-general, by HARRISON & PEEPLES, *contra*.

SIMMONS, Justice.

Bennett was tried for the offence of burglary, and was convicted. He made a motion for a new trial, which was refused, and he excepted. One of the grounds of

86	401
87	16
86	401
92	448
86	401
103	840
86	401
113	1064
86	401
115	720

the motion is that the prosecuting attorney, in the closing argument, argued that the defendant had a bad character; that he had a right to prove his good character and had not done so. The defendant objected to this and requested the court not to allow it. The court stated that the argument was proper and he would allow it to proceed. Following is a note which the court attaches to this ground:

"The first ground of the motion for new trial is true with the following additional statement in connection with what occurred and in explanation thereof: In his argument before the jury defendant's counsel had stated and reiterated repeatedly, (1) his personal conviction that the defendant was an honest man and a man of good character, and that nothing criminal had ever before been charged against him; (2) that the defendant was a man of as good a character as Bowers, one of the State's witnesses, and stood as well in the community as Bowers did; (3) that Duncan, a witness for the State, was a man of good character and had employed defendant for six years, and that Duncan would not have done so if defendant was a thief; and (4) that defendant stood well among his neighbors and was regarded where he lived as an honest man and one of good character, so far as the evidence in this case disclosed. In replying to these arguments the solicitor-general said, in doubtful cases, in cases where the State had proved many suspicious facts and circumstances against a defendant, the law allowed him to prove his good character, and that if this defendant was a man of such good character and reputation as his counsel had insisted he was, why had he not called some of his neighbors to prove his good character? and that his failure to do so must be because he had no such good reputation. When the point was made that this argument was improper, the court refused to interrupt the solicitor-general, because of the fact that defendant's counsel had made the statements above mentioned.

We think the court erred in allowing the State's counsel to argue before the jury, after objection by the prisoner's counsel, that the defendant's character was

bad because he had a right to prove his good character and had not done so. The accused is not bound to put his character in issue. If he omits to do so, no inference of his guilt can be drawn therefrom by the jury. The general rule is, that the omission to show good character does not justify a presumption that the character is bad, from which an inference of guilt can be drawn. *People v. Godine*, 1 Denio, 281; *Ackley v. People*, 9 Barb. 609; *State v. Dockstader*, 42 Iowa, 436; *State v. O'Neill*, 7 Ired. 251; *State v. Upham*, 38 Me. 261; *Stephens v. State*, 20 Tex. App. 255; *People v. White*, 24 Wend. 520; *Donoghoe v. People*, 6 Parker's Crim. Rep. 120; *Cluck v. State*, 40 Ind. 270; *Fletcher v. State*, 49 Ind. 134; 1 Bish. Cr. Pro. §1119.

The State is bound to prove the guilt of a defendant beyond a reasonable doubt, whether his character has been good or bad. It does not follow because an accused person may have a bad character, that he is guilty of the particular offence for which he is being tried. Counsel both for the State and the accused, should be compelled by the court to confine themselves in their arguments to the evidence in the case. In this State the defendant has a right to make a statement of his defence to the jury, and it has been held in several cases that the State's counsel, where the defendant omitted to make such statement, had no right to argue that fact to the jury. Nor can the jury infer guilt from the defendant's omission to make the statement. If the State's counsel is not allowed to argue this fact to the jury, why should he be permitted to argue that the omission to prove good character is evidence of bad character? Why should the jury be permitted to infer that his character is bad because he has omitted to prove good character?

The trial judge, however, certifies that he permitted the State's counsel to make this argument because the

prisoner's counsel had argued to the jury that the prisoner had a good character, etc.; meaning thereby that as the prisoner's counsel had argued to the jury a fact which was not in evidence, it was proper to allow the State's counsel to reply to that argument and to say that the prisoner's character was bad because he had a right to prove good character and had failed to do so. In *State v. Upham*, 38 Me. 261 (*supra*), the indictment charged the accused with having in his possession counterfeit bank-bills. He offered no evidence of his general good character, but his counsel argued to the jury that from his position in society as postmaster, his character ought to avail him in aid of the common presumption of innocence. Counsel for the government argued that the want of such testimony authorized the jury to infer that his character was bad. Refusal of the court to instruct the jury, upon request, that the failure to offer such proof afforded no inference of guilt or that the character was not good, was held error.

There are many authorities which hold that the law presumes that a defendant has a good character. This was held in the case of *Stephens v. The State*, 20 Tex. App. 269; and in the case of *Cluck v. The State*, *supra*, the Supreme Court of Indiana held that the law presumes that every man has a good character, and that it would have been competent for counsel to have commented on such presumption. This rule is also laid down in *Sackett on Instructions to Juries*, p. 651. In the case of *Goggans v. Monroe*, 31 Ga. 331, the defendant's counsel in his argument insisted that the plaintiff's character was bad; whereupon counsel for the plaintiff requested the court to charge the jury that the law presumed the plaintiff to be of good character until the contrary was shown by proof. The trial judge refused to charge as requested, and this court held that "it was error in the court to refuse to charge on request

that the law presumes the character of the party to be good until the contrary is proven." JENKINS, J., in delivering the opinion, said: "Defendant's counsel having argued that plaintiff's character was bad, and this argument being likely to prejudice his case before the jury, he was entitled to the *legal* presumption that, in the absence of evidence proving the contrary, his character was good; and it was error in the court to refuse to charge, on request, that the law did so presume."

But whether this be true or not, we hold that the court erred in allowing the State's counsel, over the objection of the prisoner's counsel, to make this argument to the jury, although the latter had first violated the rules of court by going outside of the evidence. The fact that the prisoner's counsel had violated the rule, would not authorize the State's counsel to do likewise. To hold that because counsel on one side violates a rule of court in his address to the jury by making statements outside of the evidence, the opposing counsel has the right to violate the rule in like manner, over objections of opposing counsel, would be to turn a court, where justice should be administered according to the rules of evidence and of law, into a town-meeting. We could as well hold that if the prisoner's counsel introduces illegal evidence, the State's counsel can reply by introducing other illegal evidence; and this, we have held, cannot be done. *Woolfolk v. The State*, 81 Ga. 551. In the case of *Mitchum v. The State*, 11 Ga. 615, one of the grounds of the motion for a new trial was, that the court erred in allowing the solicitor-general, in the concluding argument, although objected to by counsel for the accused, to support the testimony of *Eilands* by stating that he was an unwilling witness for the State, that he had refused to come under *sub-pœna*, and was brought by arrest under attachment,

none of which was in evidence before the jury, the court remarking that it was allowable because B. K. Harrison, one of the defendant's counsel, in his argument to the jury, had stated that *Ellands* was locked up on the Sabbath before the trial with the father-in-law of the deceased and the prosecutor, drinking with them, none of which was in evidence, Mr. Harrison contending that *Ellands* was a willing and a bribed witness. In the opinion (p. 628), NISBET, J., in dealing with this ground said: "The seventh exception is founded on the refusal of the court to restrain the solicitor-general, although requested so to do by counsel for the prisoner, from commenting on facts not in evidence, in his concluding speech to the jury. This we think was an error. We have had occasion to consider the habit of counsel in addressing the jury, of commenting upon matters not proven and not growing out of the pleading, before, and have been content with visiting it with a decided and emphatic disapproval. *Berry v. The State*, 10 Ga. 522, 523. We entertain no shadow of doubt as to the necessity of pronouncing it, as we now do, illegal and highly prejudicial to a fair and just administration of the rights of parties, either on the criminal or civil side of the court. It is the duty of the court to prevent such comments, and in all cases where this is not done, provided the court is requested to prevent them, we shall hold, as we rule in this case, that it is good ground for a new trial. There was, it is true, some excuse for the license conceded to the solicitor-general in this case, in the fact that counsel for the prisoner had already taken the same liberty in his argument to the jury. The solicitor-general, no doubt, felt called upon by the obligations of his office, to remove any wrong impression which the argument of counsel for the prisoner had made as to the credibility of the witness. Disregarding, however, these

things, we have no option but to make this case the occasion of establishing a rule upon this subject. In doing this, I am sure that it is scarcely necessary to say that we disclaim any purpose of inflicting a personal censure upon the able and upright judge who presided in the cause, or upon the counsel and the prosecuting officer. If no other reason existed for this disclaimer (and there are many), sufficient reason would be found in the usage of our courts, which has gone very far to sanction the habit referred to. Its practical tendency is bad upon the court, the bar and the jury. If this were all, perhaps our duty would stop with the expression of such an opinion; but this is not all, for in our judgment it is violative of the rights of the citizen litigant in the courts of justice; and if so, we are not at liberty to stop short of making it cause for a new trial." See also, upon the same line, *Tucker v. Henniker*, 41 N. H. 317; *State v. Upham*, 38 Me. 261; *School Town of Hennies v. Vogal*, 87 Ill. 242; *Fox v. The People*, 95 Ill. 71; *Rochester v. Shaw*, 100 Ind. 268; *Forsyth v. Cothran*, 61 Ga. 278; *Johnson v. Slap-  
pey*, 85 Ga. 576, 11 S. E. Rep. 862; *Augusta and Sum-  
merville R. Co. v. Randall*, 85 Ga. 298; 11 S. E. Rep. 706; *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. Rep. 87; *McDonald v. People*, 9 Am. St. Rep. 547, and note.

The proper practice, according to the majority of the cases above cited, would have been for the prisoner's counsel to have requested the court to charge the law contrary to that as asserted by the solicitor-general in his address to the jury. The record shows, however, that he did object to the remarks of the solicitor-general and requested the court to stop him, but that the court refused to do so, holding that the remarks were proper, and thereby giving the jury to understand that the rule of law laid down by the solicitor-general



was the correct one, and that they might make the inferences claimed by the prosecuting officer. Under this state of facts it was scarcely necessary for the prisoner's counsel to request the court to charge a contrary view of the law. This being a very close case on the facts, and the language of the State's counsel being calculated to prejudice the jury against the defendant, we reverse the judgment of the court below in refusing to grant a new trial upon this ground.

*Judgment reversed.*

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### HORAN v. STRACHAN & COMPANY.

86	408
108	244
86	408
118	187
86	408
122	369

1. Where the plaintiffs were called by the captain of a ship loaded and about to leave the port of Savannah, to take charge of it, extinguish a fire which had broken out aboard, and protect the cargo, and they agreed and proceeded to do so, they were entitled to continue in the performance of their part of the contract until its completion, and if discharged without cause, they were entitled to recover for the breach of the contract.
2. The evidence clearly shows that there was a custom to charge the custody commission and attendance fee, and that the captain knew it and contracted with reference to it; nor, considering the skill and experience required and the responsibility incurred in such employment, does the custom seem unreasonable.
  - (a) The custom is not invalid because it does not fix the amount of the attendance fee for every case. If the custom is that it shall be a reasonable fee, the custom is reasonable.
3. The evidence showing that the plaintiffs made no disbursements for the vessel, but all the disbursements were made by others, and that the captain's attention was not called to the commission on disbursements, and it not appearing that he knew that the custom in the port required him to pay it, the finding of the same in favor of the plaintiffs was unwarranted.
  - (a) Where a custom is universal or general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him; but where it is a purely local custom, a resident of Europe who, so far as appears, has never been to the particular locality, is not bound unless he know of the custom.
  - (b) Though the witnesses gave as their opinion that the person in charge of the ship would be entitled to the commission whether he furnished the money and made the disbursements or not, there

was no testimony of any instance where the agent had received these commissions when he had not furnished the money but the money was furnished by the owner. If the custom had been proved, it would not have been good and could not be enforced unless the plaintiffs further proved that they had the money and kept it for that particular purpose, or had made arrangements to procure it for that purpose and thereby incurred expense.

4. The letters of the defendant to the plaintiffs, and the surveys made in pursuance of the call of the British vice-consul, were not inadmissible because written and made after the revocation of the agency.

December 23, 1890.

Master and servant. Principal and agent. Contracts. Custom. Charge of court. Evidence. Verdict. Practice. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

GEORGE A. MERCER, for plaintiff in error.

GARRARD & MELDRIM, *contra*.

SIMMONS, Justice.

Strachan & Co. sued James Horan, the owner of the British steamship "Resolute," on an account, upon a bill of particulars attached to the declaration, the said account being made up of the charge of  $2\frac{1}{2}$  per cent. commission commonly known as "custody commission," upon the value of the cargo discharged, covering services rendered and work and labor done in and about the steamship "Resolute" in the port of Savannah, and also an attendance fee of \$500, and also a commission on disbursements of the ship of  $2\frac{1}{2}$  per cent. thereon, the whole amounting to \$4,975. There were other counts in the declaration for work and labor done, and also a *quantum meruit*. The defendant appeared and pleaded the general issue. It appears from the record in this case that about 5 o'clock in the morning, October 1st, 1887, the steamship "Resolute," then loaded with 5,003 bales of cotton, had cleared for sea; and while she was taking on coal preparatory for leaving

the harbor, a fire broke out aboard ship. The plaintiffs, who were then doing business in the city of Savannah as shipping merchants, were sent for by the master of the vessel, and Strachan, the senior member of the firm, responded, went aboard the vessel and reported to the master, and then and there the vessel and her cargo were put in charge of said firm just as vessels in distress are usually put in charge of merchants in that port. The testimony shows that after Strachan had superintended the discharge of the cargo from the ship for some two hours, they adjourned to the cabin to talk over the condition of affairs. The captain swore: "I asked Strachan if there would be any extra fees charged in connection with this matter. He replied a custody commission had always been paid in similar cases. I said I considered I required an agent, and if such was the charge I considered he deserved the preference, being my outward agent. He and I at the time never anticipated that the whole of the cargo would be discharged, but were in hope of extinguishing the fire in a very short time. I then found I required a wharf to land the cargo that was discharged, and requested Strachan to secure one on the most reasonable terms. Strachan & Co. continued to act as my agents until Monday afternoon, October 3d, 1887, when I received a telegram from Chubb, my owner's special agent, to the effect to withdraw the agency from Strachan & Co. unless they would waive their custody commission fee, etc." Strachan swore that he was employed by the master of the vessel early in the morning on the 1st of October, the ship being then flooded with water in attempting to extinguish the fire in the cargo, and that he immediately went to work to assist the captain in every way possible, and that when he went to the cabin and got breakfast he explained to the captain that by appointing him agent, there were certain cus-

tomary charges, such as custody commission of  $2\frac{1}{2}$  per cent. and attendance fee for managing this business, to accrue; and the captain said, "Very well, if it was the custom of the port he could not help it, and as Strachan was the agent of the ship before, it would be better for him to attend to the business than any one else." A great deal of other testimony was put in by the plaintiffs and the defendant under the *quantum meruit* count; also testimony going to show the custom of the port of Savannah as to the custody commission, attendance fee, and commission on disbursements. The testimony upon the last item will be given more fully hereafter in this opinion. The jury returned a verdict for the plaintiff, and the defendant made a motion for a new trial upon many grounds, which was overruled by the court; and the defendant excepted.

The main and controlling questions argued before us were, (1) did the captain of the vessel, under the instructions from Chubb the underwriter, approved by Horan the owner, have a legal right to discharge Strachan & Co. from his employment without sufficient cause; and (2) was Horan, the owner, bound by the custom of the port of Savannah in regard to custody commission, attendance fee and commission on disbursements?

1. As to the first question, it was contended by counsel for the plaintiff in error that Strachan & Co., being simply agents of the owner of the vessel, might be discharged at any time at the option of the principal or owner; in other words, that their agency could be revoked by the principal whenever he saw proper to do so, such agency not being coupled with an interest. While we admit this to be the general law as applied to agents who represent the principal in and about his business, we do not think it applies under the facts of this case. The employment of Strachan & Co., under

these facts, was something more than the appointment of an agent. It was more in the nature of an employment or hiring than an appointment to an agency. It was in the nature of a contract between the captain of the vessel, as the owner's agent, and Strachan & Co., whereby the latter agreed to extinguish the fire and if necessary unload the vessel of its cargo, and do any and everything else for the protection of the vessel and cargo. They were employed to do a particular thing, and were contractors, instead of agents in the general understanding of agency. Strachan & Co. therefore being contractors, servants or hirelings of Horan to do this particular job, Horan, in our opinion, could not rightfully discharge them without sufficient cause. If a man's house is on fire and he employs another to extinguish the fire and save the house, he cannot rightfully discharge the person employed for this purpose, unless there is sufficient cause. Or if he employs one to build him a house, or cut a ditch or make him a road, he cannot discharge him without sufficient cause. If he should do so, it would be a breach of the contract. Yet according to the contention of counsel for the plaintiff in error, under the particular facts of this case, all those persons would simply be the agents of the employer, and he could discharge them without a breach of his contract, and they would only be entitled to compensation for the services performed up to the time of the discharge. We cannot agree with counsel in this view of the law. When the steamship was found to be on fire and the captain sent for Strachan & Co. and requested them to take charge of the ship and extinguish the fire and protect the cargo, and Strachan & Co. agreed to do so, and accordingly proceeded to do so, in our opinion it was a contract between them, and Strachan & Co. were entitled to continue in the performance of their part of the contract until its comple-

tion; and if they were discharged without cause it was a breach of the contract, and they would be entitled to recover; and the trial judge having taken this view of the case in his charge to the jury, there was no error in the charges given upon this subject, nor in his refusal to charge as requested by the defendant.

2. This brings us to the question, what were they entitled to recover? Strachan & Co. insist that under the custom of the port of Savannah, they were entitled to recover a custody commission of  $2\frac{1}{2}$  per cent. on the value of the cargo discharged, a reasonable attendance fee on surveys and general supervision, and a commission of  $2\frac{1}{2}$  per cent. on disbursements connected with the business of the ship in distress. The plaintiff in error, Horan, insists (1) that there was no such custom in the port of Savannah, (2) that if there is such a custom, it is an unreasonable custom, and (3) that the captain of the vessel, the agent of the plaintiff in error, did not know of the custom.

As to the custody commission and attendance fee, and the knowledge of the captain in regard thereto, the evidence clearly shows that there was such a custom in Savannah, and that the captain knew it and contracted with reference to it. It will be remembered, from the recital of facts above given, that when Strachan had been in charge of the vessel about two hours, he went down to the cabin to breakfast with the captain, and then informed him that "by appointing him (Strachan) agent, there were certain customary charges, such as custody commissions of  $2\frac{1}{2}$  per cent., and attendance fee for managing this business, to accrue"; and the captain said, "Very well, if it was the custom of the port he could not help it"; and that as Strachan had been agent of the ship before, it would be better for him to attend to the business than any one else. The captain does not deny this statement of Strachan, but what

he says goes to confirm it. It is therefore clear to our minds that the captain fully understood that there was a custom in Savannah, and the amount of the custody commission, and assented to the custom. As said before, we think the evidence clearly establishes that there was such a custom, as to custody commission and attendance fee; and taking into consideration the skill and experience required and the responsibility incurred in such employment, as shown by the evidence, we cannot say that the custom is an unreasonable one. It must require great skill to manage a vessel loaded with cotton, when on fire. If by negligence, or a mistake which a skilful person would not make, injury is sustained by the vessel or cargo, the person employed would be liable therefor; and in case of serious loss or injury the damages would be heavy. And we suppose that the custom fixed these fees in view of the risk and responsibility assumed by the person employed.

It was argued, however, by counsel for the plaintiff in error, as to the attendance fee, that it was unreasonable because the custom did not fix it in every case. There was no custom as to any certain amount, but it was left to the discretion of the person employed, and counsel claims that according to this custom, when the person employed fixes the amount, it is final. We think the evidence shows that although the custom did not fix the fee, it must be a reasonable fee. In our opinion, a custom is not invalid because it does not fix the amount of the fee for every case. If the custom is certain that it must be a reasonable attendance fee, that is sufficient. If custom had undertaken to fix the same fee for every case, it would not have been a good custom. The jury found \$300 to be a reasonable attendance fee upon the steamship "Resolute," loaded with 5,003 bales of cotton. That would have been an unreasonable fee in the case of a small schooner loaded

with fish or oysters, or with ballast. If the custom is that it shall be a reasonable fee, that is sufficient to render it a reasonable custom. Nor is the owner of the vessel absolutely bound by the fee fixed by the person employed. If it is unreasonable he can resist it, as the defendant did in this case, and the jury may reduce the amount to what the proof shows to be reasonable, as was done in this case.

3. It will be observed that in our discussion thus far, we have omitted the third item of the charges, to wit, two and a half per cent. commission on disbursements. On this subject the evidence discloses the fact that Strachan & Co. were discharged on the 4th of October, and that they did not make any disbursements for the vessel, and that all the disbursements were made by other parties. The evidence further discloses that in the conversation between Strachan and the captain of the vessel, when the latter asked as to the fees, Strachan did not mention this item, but only called attention to the custody commission and the attendance fee. There is no evidence going to show that the captain's attention was called to this item of expense, or that he knew that the custom in Savannah required him to pay it. The court therefore, we think, erred in charging the jury that "if they should find that at the time of making the contract of agency with plaintiffs, the custom of the port of Savannah claimed to exist was not known to the captain of the vessel, and that after that time he was notified of it and informed of it, and did not rescind at once, but allowed and ratified and confirmed the contract, then the jury would find necessarily that he knew it; but he would have had the right then to have said, 'I do not confirm the contract except provisionally; I will ascertain whether it will go'; and under the circumstances he would have had the right to have said, 'I claim I know nothing of this; I will



have to consult with my owners, and we will let it stand in abeyance until we find out, and then we will let it go on.' That would be right and that would be proper." This charge, under the facts of this case, may have been correct as to the custody commission and attendance fee; for, as we have seen, they were mentioned to the captain of the vessel; but it could not be correct as to the item under consideration, for the evidence shows that the captain was not informed of it, and therefore did not contract with reference to it. If the law is as seems to have been intimated by the court in this charge, that it was necessary, as to a purely local custom, for a stranger to the locality to have knowledge of it before he would be bound thereby, then it is quite certain that under the evidence the captain had no such knowledge. We are inclined to think that the trial judge took the correct view of the law on this subject. Where a custom is universal or general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him; but we are inclined to think that where it is a purely local custom, like this, a person who resides in Europe, and who, so far as the evidence discloses, has never been to the particular locality before, is not bound, unless he has knowledge of the custom. *Carter on Carriage by Sea*, p. 184; *Gabay v. Lloyd*, 3 Barn. & Cress. 793; *Hathesing v. Laing*, L. R., 17 Eq. 92. See 1 *Smith's Leading Cases*, part 2, p. 962, *American note to Wigglesworth v. Dallison*, and cases cited.

Moreover, this part of the custom was not as well proved as was the custom in regard to the other items. None of the witnesses cite any instance where commissions on disbursements were charged and allowed to one who did not furnish the money. It is true that most of the witnesses gave it as their opinion that the person in charge of the ship would be entitled to the

commission whether he furnished the money and made the disbursements, or not; but custom is not a question of opinion, but of fact, and cannot be proved by the opinion of witnesses that it ought to be so and so; it must be proved that the custom exists—that it is a fact. The court and jury cannot act upon the opinion of the witnesses; they must be guided by that which has been the practice, and no witness testified to any instance where the agent had received these commissions when he had not furnished the money, and the money was furnished by the owner. Read *v. Rann*, 10 Barn. & Cress. 439; 21 Eng. Com. L. Rep. 189; American notes to *Wigglesworth v. Dallison*, 1 Sm. Lead. Cas., part 2, 962, and authorities there cited.

Besides, we think if the custom had been proved, it would not have been a good custom and could not have been enforced by law, unless the plaintiff went further and proved that he had the money and kept it for that particular purpose, or had made arrangements to procure the money for that purpose, and thereby incurred expense. It seems to us it would be absurd to hold that a person is entitled to two and a half per cent. commission on disbursements which he never made and did not have the money to make and had made no arrangements to procure the money to make, and which disbursements were made by the owner of the vessel or some one else for him. We think, therefore, that the court erred in giving the charge above set forth, as to this particular item, and that the jury found contrary to law and the evidence in finding a verdict for this commission on money which the plaintiffs had not disbursed and which they had made no arrangements to disburse.

4. The court did not err in overruling the objections to the admissibility of the letters of Horan to the plaintiff, and the surveys made in pursuance of the call of

the British vice-consul at Savannah, upon the grounds taken therein and stated in the motion for a new trial, to wit, that the testimony was irrelevant because the letters were written and the surveys made after the revocation of the agency. The surveys, if otherwise unobjectionable (as to which we express no opinion), were not inadmissible on the ground taken in the objection.

The court having erred in its charge as to the commission on disbursements, and the jury having found \$687.50 as commission on disbursements of \$27,500.00 at 2½ per cent., we reverse the judgment of the court below in refusing a new trial upon this ground; but if the defendants in error will, within thirty days after this judgment is made the judgment of the court below, write off said sum of \$687.50, then the judgment will stand affirmed. *Judgment reversed, with direction.*

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THE OCEAN STEAMSHIP COMPANY v. MATTHEWS.

1. The verdict in the plaintiff's favor for \$1,000 damages for permanent and painful injuries sustained by him from a falling bale of cotton, while he was in the employment of the defendant and in the discharge of his duty in the lower hold of a ship, was not contrary to law or evidence, and was not excessive.
2. The instructions of the court which are complained of, taken in connection with the entire charge and the evidence upon which they were predicated, were as favorable as the defendant was entitled to ask.
  - (a) The master was not relieved from liability by the fact that the hooks from which the bale of cotton slipped might, while in their defective condition, have been used or had been used without injury.
  - (b) If the defect was one which the master should have known, he will be presumed to have known it. If he should have known, he was negligent in not knowing; and negligent ignorance is equivalent to knowledge. The patent and obvious character and apparent age of the defect may indicate that the master should have known it.

(c) It appearing that the servant (the plaintiff) did not know of the defective condition of the hooks, and that it was not his duty to inspect and apply them, but that his employment confined him to the lower hold of the ship, where he did not and could not see them; and it further appearing that the master, instead of furnishing safe and suitable hooks, provided such as were obviously unsafe and unfit at and before the time of the injury, and had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary care, the assumption that the master knew of their condition is proper; and there having been no effort to show otherwise, the verdict should stand.

December 23, 1890.

Damages. Verdict. Charge of court. Master and servant. Negligence. Before Judge HARDEN. City court of Savannah. July term, 1890.

Reported in the decision.

LAWTON & CUNNINGHAM and E. S. ELLIOTT, for plaintiff in error.

GARRARD & MELDRIM, *contra*.

SIMMONS, Justice.

The plaintiff, while in the employment of the defendant, and in the discharge of his duty in the lower hold of a ship, was injured by a falling bale of cotton. He alleged in his declaration, that he was hurt because the hooks by which the cotton was lowered from the upper part of the ship, were, by the negligence and default of the defendant, unsafely constructed, in disrepair, unfit for use, of defective and improper material, in an unsafe condition and unfit for the purpose for which they were being used, being so defective as not to securely hold the cotton, on account of their generally defective condition, and particularly because the points of the hooks, being worn smooth and having been forced from an acute to an obtuse angle, failed to securely catch and hold the cotton. He alleged that the defendant knew or ought to have known this; and that he himself did not know, and was injured without fault on his part.

The evidence for the plaintiff (which was the sole evidence introduced in the case), showed that he was hurt, as alleged, by the slipping of the bale from hooks which were so defective as not to securely hold the cotton, the point of one of the hooks being blunt, and the point of the other bent from its proper position. These hooks were applied to the bale by another employee in another part of the ship, who testified that although "the hooks had brought down three or four bales that afternoon and they came down all right," he "saw there was danger in one of the hooks," and that it was blunt enough to make him think the bale was going to slip. According to some of the testimony this was the first bale that came down, and the hooks had not been used before. It was also shown that the plaintiff did not know of the defective condition of the hooks, and had no opportunity to look at them when used on this occasion, and that it was not a part of his business to inspect them. Nor was this the business of the employee who applied them to the cotton, so far as appears from the evidence. According to the latter's testimony, "that was attended to by other people; when the hooks are given to us to work with, we must go ahead whether they are all right or not." The plaintiff was permanently injured; his leg broken in two places between the knee and hip, being crushed between the falling bale and the edge of a wooden cask, and thereby shortened and made crooked; he was laid up in bed and confined to his house for several months; his injuries impaired his efficiency and rendered him unable to lift heavy weights, and his general health was greatly impaired.

The jury found in favor of the plaintiff a verdict for \$1,000. The court overruled a motion for a new trial by the defendant based upon the grounds (1, 2) that the verdict was contrary to law and the evidence and ex-

cessive in amount, and (3, 4, 5) that the court erred in certain charges to the jury, hereafter set out.

1. The verdict is not contrary to law and the evidence. Under the charge of the court, the jury were not allowed to return a verdict for the plaintiff unless they should find from the evidence that he was injured because of the negligence of the defendant or its employees whose duty it was to look after the hooks, in failing to provide and maintain, so far as reasonable precautions, prudence and investigation might go, implements reasonably good and safe for the performance of its work; that he was without fault himself; and that the injury was not caused by the carelessness of a co-employee in and about the same line of business with the plaintiff. The verdict, therefore, amounted to a finding that these facts were established. This finding is supported by evidence, uncontradicted by any evidence on the part of the defendant, and is approved by the judge who tried the case. These facts being established, the defendant's liability under the law stood established. Nor was the defendant relieved from liability, as was contended by counsel, by the fact that these hooks while in this defective condition might have been or had been used without injury. "The fact that a servant may, by care and caution, so operate a defective and dangerous machine as not to produce injury to his fellow-servants, does not exempt the master from his liability for an omission to exercise reasonable care and prudence in furnishing safe and suitable appliances." *Shearm. & Redf. Neg. §194*. Nor was the verdict excessive in amount. The evidence establishes the painful, permanent and disabling character of the injuries sustained by the plaintiff, who was a young man twenty-four years of age, with a reasonable expectation of many years of life before him.

2. The 3d, 4th and 5th grounds of the motion, which

may be considered together, complain of certain instructions of the court as to the *onus* of proof. These instructions were, in substance, that if the plaintiff should show that the implements employed by the defendant or furnished to its employees were not fit implements, but were in a defective and improper condition, and the defect was such as to indicate that the defendant should have known or did know of its existence, the presumption would be that the defendant knew, and the burden would be cast upon it to show that it did not know. It is true that the instructions complained of in the 3d and 4th grounds, standing alone, seem to cast this burden upon the defendant if the condition of the implements is merely shown to have been unfit and improper, but these instructions are qualified by the instruction complained of in the 5th ground, which follows, and by which the plaintiff is in addition required to show that this unfit and improper condition was such as to indicate that the master should have known or did know of it. The language is: "From the mere happening of an injury to the servant from defective appliances, there is no presumption that the master is at fault; the servant must go further and show negligence on the part of the master, unless the defect in the appliances was such as to indicate that the master should have known or did know of its existence." Elsewhere in the charge the jury were given to understand that the defective condition might be so recent that the defendant could not be presumed to know of it; and that the defendant in that event would not be responsible; the court saying: "If these hooks were in an improper condition, and had become in an improper condition so recently that the Ocean Steamship Company could not be presumed to know of it, then the Ocean Steamship Company would not be responsible." Taking these

instructions together and in connection with the entire charge and the evidence upon which they were predicated, the charge on this subject was quite as favorable as the defendant was entitled to ask.

It is a well-established proposition that if the defect was one which the master should have known, he will be presumed to have known it. If he should have known, he was negligent in not knowing; and negligent ignorance is equivalent to knowledge. (*Schmidt v. Block*, 76 Ga. 823; and authorities cited *infra*.) When the plaintiff has shown that the master ought to have known, the law does not put upon him the additional burden of proving that the master knew what it was his duty to know. On this subject counsel for the plaintiff in error cited the case of *McMillan v. Railroad Co.*, 20 Barb. 450; but as to that case and others on the same line it is said (2 Thomp. Neg. 994, n.): "Some courts have held that actual notice is necessary, ignoring the fact that negligent ignorance is, for this purpose, equivalent to notice. . . But the rule as thus stated is so obviously unsound as not to require discussion. Moreover, the highest court in the State where these rulings occur has held otherwise." "Ignorance on the part of the employer will be negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative." *Id.* 996.

It is also clear that the defect might of itself indicate that the master should have known of it. Its patent and obvious character, and the apparent age of the defect, may indicate this. The master, being under the duty not only to furnish safe and suitable implements to his employees but to keep them in that condition, is bound to know the condition of his property so far as proper inspection will enable him to know it; and where it is proved that there was a defect, and that



defect was obvious, and on its face showed that it had existed long enough before the injury to have been discovered by the master in the exercise of ordinary diligence, it is at once apparent that if the master did not know of it he might have known, and that he failed in his duty to inspect and know. For this reason the *Nelms* case, 88 Ga. 771, upon which much stress was laid by counsel for the plaintiff in error, is distinguishable from this case. That case was cited to show that no presumption arises against the master from the mere fact that the implement which caused the injury was defective. That proposition is true, and so the court charged in this case; but in the *Nelms* case the defect, which was disclosed by the sudden and unlooked-for breaking of a hammer, was latent and could not have been ascertained by the exercise of ordinary care. Here no latent defect was involved. The defect, if there was one, was patent, and not only was discoverable by the exercise of ordinary care, but could not have escaped the observation of a merely casual looker-on. And such was the case before the implement was used at all on this occasion. The plaintiff in error, it is true, contended that the condition of the implement was not defective, but did not contend that the condition, whatever it was, whether defective or not defective, was not perfectly obvious. The defect was obvious to the eye if not to the mind of the master. Once prove the contested fact which the court required the plaintiff to show, that the condition was defective, it could not be denied that it was patent. There was nothing latent about the bluntness of the one hook or the bent condition of the other. Nor was this defective condition suddenly brought about. It was shown, and was in the very nature of things apparent, that the bluntness came about by gradual wear, and should have been anticipated and guarded against

by the master and must have been seen if the implements had been looked at within any reasonable time before the injury.

The remaining authorities cited on this subject for the plaintiff in error are also distinguishable from the case at bar. In *Humphreys v. Railroad Co.* (W. Va.), 10 S. E. Rep. 39, the court says, it did not appear that the defect was such as inspection would have detected; and besides the plaintiff knew of it and was the only one that knew, so far as appeared from the evidence. In *Mobile, etc. Railroad Co. v. Thomas*, 42 Ala. 672, the court says: "It might be that in the use of the engine the unsafeness had never been developed." In *Columbus, etc. Railroad Co. v. Troesch*, 68 Ill. 545, 18 Am. Rep. 578, it did not appear that the engine was obviously unsafe or defective; indeed the court held that the plaintiff failed to prove that there was a defect which could have been known by the exercise of diligence. Besides, that case as far as it goes is in accord with the charge complained of in the present case, for it holds in effect that in order to charge the master with notice of the defect, it is enough to show that in the exercise of diligence he ought to have known of it. And it is not held, either in that case or the others cited, that the defect may not of itself be sufficient to show that the master ought to have known, and thus raise the presumption that he did know.

Of the abundant authority which could be cited to sustain what has here been said, the following will suffice:

In *Shearman and Redfield on Negligence*, §223, it is said: "It is enough to prove that the materials were defective in such respect that if a proper inspection had been maintained, the defects would probably have been ascertained in time to have prevented the injury." See also *Id.* §194.

In Wood on Master and Servant, §346, it is said: "The fact that the defect might have been ascertained by proper examination and care on the master's part, is sufficient evidence of negligence to charge him with liability." See also *Id.* §§348, 368.

In Wedgwood v. Railroad Co., 44 Wisc. 44, it was held that the defect being an obvious one, the refusal of the court to charge that knowledge of the defect by the master must be proved was not error. It was said that if the defect "was of such a character that the defendant by the exercise of ordinary care could have discovered and repaired it, it was liable for an injury sustained by an employee in consequence of such defect."

In a recent Massachusetts case (*Griffin v. Railroad Co.*, 1 Annot. Lawy. Rep. 698), the court held that the spreading of a coupling-link which injured an employee was *prima facie* evidence of negligence, and cast upon the master the burden of explanation. It was said: "If the link was not sound and suitable for use, the fact of its being used in that condition properly calls for explanation from the defendant; and if under such circumstances the defendant fails to put in any evidence, some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant, but in the absence of such explanation we think the jury might properly infer negligence on the part of the defendant." We cite this last case, not that we fully approve it, but to show how far one of the ablest courts in the Union has gone upon the subject. See also *Cowles v. Railroad*, 84 N. C. 309, distinguished from case of latent defect in *Hudson v. Railroad Co.*, by the same court, 10 S. E. Rep. 675; also *Smith v. Railroad*, 18 Fed. Rep. 304.

It being shown, therefore, by the plaintiff in this case, that he did not know of the defective condition of

these implements, and that it was not his duty to inspect and apply them, but that his employment confined him to the lower hold of the ship where he did not and could not see them; and it being further shown that the defendant, whose duty it was to provide safe and suitable implements, on the contrary provided and employed implements which at and before the time of the injury were obviously unsafe and unfit, and on their face showed that they had been so long enough for their unsafe condition to have been discovered by the master in the exercise of ordinary diligence, it is not too much to assume that the defendant ought to have known of this condition; and it is asking little enough to require it to show that it did not know, or offer some excuse for not knowing. This defence, if it existed, could easily have been made; the proof must have lain within the defendant's reach; the hooks were in its possession—presumably so, at least; and if the plaintiff's evidence as to the condition of the hooks was untrue, the defendant could easily have disproved it. But it did not even attempt to do this; it neither denied nor explained; it introduced no evidence.

The most that is complained of as to this charge is that it did not require the plaintiff to prove enough. It is certain, however, from the evidence, that whatever was charged, he did prove enough. So upon the whole the verdict should stand. *Judgment affirmed.*

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PHILLIPS v. THE STATE.

1. There being some evidence to show the defendant's guilt, and the trial judge being satisfied with the verdict, his discretion in denying a new trial will not be disturbed.
2. A defect in an indictment, in not alleging any day or month when the alleged illegal sale of liquor took place, should be taken advantage of upon arraignment. After conviction it is too late to make the point for the first time.

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3. In making up a brief of evidence, a judge is not compelled to hear evidence of others as to what was testified, when he distinctly remembers.

December 28, 1890.

Criminal law. Liquor. Indictment. Practice. Brief of evidence. Before Judge LUMPKIN. Madison superior court. March term, 1890.

The indictment was found at the September term, 1889, and it alleged that the defendant, "on the — day of —," 1888, in Madison county, was guilty of selling spirituous liquor in quantity less than one gallon without a license. The conviction (as certified by the judge) was based on the testimony of one witness exceedingly reluctant to testify what he knew. His testimony was as follows:

Direct examination: I know the defendant; he has a bar-room and store in Madison county, Georgia. I bought one half-gallon of whiskey from him more than two years before this bill was found. After that about a year, I bought from John Morris, defendant's clerk, a quart of whiskey, and paid for it, and my brothers bought a gallon. This was in that store in said county.

Cross-examination: The whiskey was bought in this way: we chipped in and bought a gallon. I called for it and paid for it.

By the court: I have never bought less than a gallon of whiskey from the defendant in the last two years, and previous to the finding of this indictment.

Redirect: My brothers and I bought a gallon. We got three quarts and drank some. I took one quart and paid for it.

The State admitted that the defendant had license covering sale of half-gallon first testified about.

On moving for a new trial, the defendant's counsel tendered for approval a brief of evidence to which the solicitor-general objected; and under direction of the court, that officer prepared one which was approved.

Before this was done, the defendant's counsel proposed to prove, by a number of witnesses who were present at the trial and heard the evidence, that it was correctly stated in the brief he had tendered. The judge refused to hear this testimony, stating that he remembered the evidence in the case perfectly, and did not care to hear any one else's memory of the matter. For the grounds of the motion for a new trial, see the opinion.

THOMAS & STRICKLAND and J. E. GORDON, for plaintiff in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN and HARRISON & PEEPLES, *contra*.

SIMMONS, Justice.

Phillips was tried for the offence of selling spirituous liquors without a license, and was convicted. He made a motion for a new trial upon the grounds that the verdict was contrary to law and the evidence, and without evidence to support it, and that the indictment was fatally defective in that it failed to allege the month or the day upon which the alleged sale took place; which was overruled, and he excepted.

This case is rather weak upon the facts, but there was some evidence going to show the guilt of the defendant, and as the trial judge was satisfied with the finding of the jury we will not interfere with his discretion in refusing a new trial.

As to the indictment being defective because it did not allege any day or month when the alleged sale took place, the bill of exceptions states that no point or objection was made as to the indictment before conviction. It is too late after conviction to take exception to a defect of this kind; exception should have been taken upon the arraignment.

We know of no law which compels a judge in making up a brief of evidence to hear evidence of others as to

what was testified to, when he remembers it distinctly himself, as the judge certified he did in this case.

*Judgment affirmed.*

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CHRISTIAN *et al.* v. THE STATE.

1. There was sufficient evidence to authorize the verdict.
2. A ground for new trial, that the court erred in admitting certain testimony, not stating what objection was made to the testimony, nor whether objection was taken at the time of the trial, or put in at the time the motion for new trial was made, cannot be considered.
3. Where evidence was admitted without objection and was ruled out on the defendant's motion, the defendant has no right to complain.
4. A ground for new trial not approved by the judge cannot be considered.

December 23, 1890.

Criminal law. Retailing liquor. Evidence. Practice. Before Judge LUMPKIN. Madison superior court. March term, 1890.

The indictment charged Christian and Pass with retailing spirituous liquors without license to one Dal Cash, on February 21, 1889. The evidence for the State showed that Cash, his wife, Russell and Moon went to defendant's bar-room in February, 1889, and Cash bought of Christian a half-gallon (not more) of corn-liquor in a jug, paying \$1 for the liquor; that Russell died on his way home, two or three hundred yards from the grocery; and that Christian sold him a pint of liquor that day, and he and Cash drank it all and drank some out of Cash's jug. The evidence for the defendants tended to show that Cash bought of Christian a gallon of whiskey for which he paid \$2; that he first asked Pass to let him have half a gallon, but Pass refused, saying he had no license to sell less than a gallon; and that Christian then sold the gallon, measuring it and putting half of it into a jug and the

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remainder into two quart bottles. For the grounds of the motion for a new trial, see the opinion.

J. E. GORDON and THOMAS & STRICKLAND, for plaintiffs in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN and HARRISON & PEEPLES, *contra*.

SIMMONS, Justice.

These defendants were indicted and tried for the offence of selling liquor without license, and were convicted. They made a motion for a new trial on the grounds that the verdict was contrary to law and the evidence and without evidence to support it, and upon other grounds which will be mentioned hereafter. The motion was overruled, and the defendants excepted.

1. We think there was sufficient evidence to authorize the finding of the jury.

2. The 3d ground is that the court erred in allowing the State to prove, over the objection of the defendant's counsel, that Ben Russell died the same day, before going more than 300 yards from the grocery. It is not stated in this ground what the objection was to this testimony, or whether it was taken at the time of the trial, or put in at the time the motion was made for a new trial. We therefore cannot consider it.

3. The 4th ground complains that the court erred "in allowing the State to prove that defendants were witnesses for two negroes charged with gambling in their bar-room, and then ruled out the evidence, the negroes being defendants' witnesses in this case, said testimony going in without objection and being ruled out on defendants' motion." If the evidence went in without objection, and was ruled out on the defendants' motion, we cannot see how the defendant was injured thereby, or what ground he has to complain.

4. The 5th ground was not approved by the court, and therefore cannot be considered.

*Judgment affirmed.*



## ROBERTS v. RAMSEY.

The words, "You are a God damned thief," are actionable *per se*, and it is not necessary for the plaintiff to prove that they referred to any particular transaction or charged any special crime. If the defendant claim that they were intended merely as words of abuse and not to charge a crime, it is for him to show that such was the intention.

December 23, 1890.

Slander. Nonsuit. Before Judge LUMPKIN. Lincoln superior court. April term, 1890.

Reported in the decision.

JOHN T. WEST, by brief, for plaintiff.

THOMAS E. WATSON, by brief, for defendant.

SIMMONS, Justice.

Mrs. Roberts sued Ramsey in an action for slander. Her declaration alleged that "in a certain discourse which the defendant had with, of and concerning her, he used the following slanderous and defamatory words, that is to say, 'You' (meaning the petitioner) 'are a God damned thief'; meaning thereby that your petitioner was guilty of theft or larceny." The evidence showed that the defendant was her brother; that he was angry with her son Alec, because Alec's mule had eaten his (defendant's) oats; that the defendant came to her house, and she saw that a difficulty might arise, as they were quarrelling, and told the defendant to go on home, and told Alec to go into the house. The defendant then said to her: "You shut up. You are a God damned thief, and all your children are damned thieves." There were present Alec and another son of the plaintiff, and a negro girl, besides the plaintiff and the defendant; the words being spoken in a tone to be heard by all of them.

Upon motion of the defendant's counsel, the court granted a nonsuit, and the plaintiff excepted. Counsel

for the defendant in error argued before us to sustain the action of the court in granting a nonsuit in this case, that these words were not actionable *per se*, because they did not refer to any particular transaction, nor did they charge any special crime, but were merely abusive. We think the words were actionable *per se*, and that it was not necessary for the plaintiff to prove that they referred to any particular transaction or charged any special crime. Our code, §2977, declares that it shall be slander to impute to another a crime punishable by law. To charge another with being a thief is in effect to charge him with the crime of larceny, which is a crime punishable by law. The injury to the reputation of the person is the gist of the action. In Odgers on Libel and Slander, p. 54, it is said: "Spoken words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage." "The words must clearly impute a crime punishable with imprisonment, although they need not state the charge with all the precision of an indictment. If merely fraud, dishonesty, immorality or vice be imputed, no action lies without proof of special damage. And even where words of specific import are employed (such as "thief" or "traitor"), still no action lies if the defendant can satisfy the jury that they were not intended to impute crime, but merely as general terms of abuse, and meant no more than "rogue" or "scoundrel," and were so understood by all who heard the conversation. But if the bystanders reasonably understood the words as definitely charging the plaintiff with the commission of a crime, an action lies." *Id.* 61. So it appears from this author that where the defendant claims that the words were intended, not to charge a crime, but merely as words of abuse, the defendant must satisfy the jury that such was the intention. The words being action-

able *per se*, and the defendant not having put in any evidence to explain them, or to show that they were intended as words of abuse only and were so understood by the bystanders, the court erred in granting a nonsuit. See also, upon this subject, Townshend on Slander and Libel, p. 168; Newell on Defamation, Slander and Libel, p. 118; 13 Am. & Eng. Enc. of L. p. 344, and numerous cases cited; *Pledger v. Hathcock*, 1 *Kelly*, 550; *Little v. Barlow*, 26 *Ga.* 423; *Henderson v. Fox*, 80 *Ga.* 479, and 83 *Ga.* 233; *Quigley v. McKee*, 53 Am. Rep. 320.

*Judgment reversed.*

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THE GEORGIA RAILROAD AND BANKING CO. v. MURDEN.

Where a passenger boarded a railroad train at a flag-station, for the purpose of going to Augusta, and there was a dispute between him and the conductor as to the proper rate to be charged, and the conductor informed him that he could ride at four cents a mile to the next office where tickets were sold and could get off the train there and board it again, and might ride the rest of the way for three cents a mile, and the passenger agreed to this, paid the four cents a mile to the next station, got off the train for the purpose of procuring a ticket and could not do so because the ticket-office was closed, and then boarded the train again for the purpose of continuing his journey, and tendered the conductor three cents a mile, the latter had no legal right to put him off the train because he refused to pay four cents a mile, although he had received instructions to charge four cents a mile.

- (a) A passenger is not presumed to know the private or secret rules given by a railroad company to its conductors, but has a right to rely upon their statement as to what the rules are, in contracting with them.
- (b) The rule shown the passenger by the conductor in this case, did not put the passenger upon notice that the conductor had no right to make the agreement above mentioned.

December 23, 1890.

Railroads. Passengers. Agency. Before Judge LUMPKIN. Taliaferro superior court. February term, 1890.

Reported in the decision. For former report see 83 *Ga.* 753.

86	434
1128	638

J. B. CUMMING, M. P. REESE and BRYAN CUMMING, for plaintiff in error.

J. W. HIXON and J. C. HART, *contra*.

SIMMONS, Justice.

The main ground relied on by counsel for the plaintiff in error for reversal of the judgment of the trial judge in refusing to grant a new trial, is the 3d ground of the motion, which is as follows:

Error in charging as follows: "If Murden got on defendant's train at Robinson, announcing to the conductor his intention to go to Augusta, and if in conversation ~~between~~ the conductor and Mr. Murden the conductor told Mr. Murden that if he, Murden, would pay four cents a mile to Crawfordville and there get off the train and get back again, then he, the conductor, would charge him only three cents a mile from there to Augusta, and if Murden did these things, then the conductor had no right to charge him more than three cents a mile from Crawfordville to Augusta." The error assigned as to this charge is, that the conductor being the agent of the railroad, it was beyond the scope of his agency to make any such agreement with the passenger, especially as the conductor showed the passenger the rule-book. Murden, the passenger, testified that there was such an agreement made, and he relied and acted upon it. The conductor denied this. The jury found by its verdict that such an agreement was made between the conductor and the passenger. We think that where the passenger got aboard the train at a flag-station for the purpose of going to Augusta, and there was a dispute between him and the conductor as to the proper rate to be charged, and the conductor informed him that he could ride at four cents a mile to the next office where tickets were sold, and could get off the train there and board it again, and might ride the rest of the way for three cents a mile, and the pas-

senger agreed to this and paid the four cents a mile to the next station, got off the train for the purpose of procuring a ticket and could not do so because the ticket-office was closed, and then boarded the train again for the purpose of continuing his journey, and tendered the conductor three cents a mile, the conductor had no legal right to put him off the train because he refused to pay four cents a mile. The passenger had a right to rely upon the statement of the conductor, and if he acted upon this agreement and partly performed it, the conductor could not put him off the train, although his instructions were to charge four cents a mile. The passenger is not presumed to know the private or secret rules given by the company to its conductors, but has a right to rely upon their statement as to what the rules are, in contracting with them. But it is said in reply to this, that the passenger knew that the conductor had no authority to make such an agreement, because the conductor showed the passenger his rule-book. The rule shown to the passenger, as it appears in the record, is as follows:

“Georgia Railroad Commission Rule. Number 9 of the rules governing the transportation of passengers:

“The regulation of the railroads as to passengers without tickets is a matter of police, with which the commission will only interfere upon complaint of abuse. An extra charge of more than one cent per mile, full fare, or one half cent, half fare, is regarded as excessive, unless such extra charge would fall below the minimum above given”

The two other rules of the State railroad commission set out in the record do not appear to have been shown to the plaintiff, and are of a date subsequent to the bringing of this suit.

We do not think this rule put the passenger upon notice that the conductor had no right to make the agreement, (1) because it does not appear that it is a

rule of the defendant company, but appears to be a circular issued by the railroad commission of the State to put the railroads upon notice that an extra charge of more than one cent per mile full fare is regarded as excessive, unless "such extra charge would fall below the minimum above given." What the minimum above given was or means, we do not know from this record; nor does it appear that the passenger knew. (2) Taking it to be a rule of the company, it does not show that the conductor had no right to make such an agreement with the passengers. It did not specify that when a passenger got on at a flag-station, he could not pay four cents a mile to a ticket-station and there buy a ticket for three cents a mile; it simply declares that more than one cent a mile would be excessive if the passenger had no ticket. It appears also from the evidence that the conductor said that if this passenger had got on at Crawfordville, a ticket-station, he would only have charged him three cents a mile, although he had no ticket. Unless there are other rules than the one in this record, we see no reason why a passenger, without any agreement, could not pay his fare from a flag-station to a ticket-station, and then buy a ticket and travel for the reduced fare; and if the rule was that the ticket-agent was not required to be at the ticket-office at the time the train passed, and passengers could travel without a ticket, from that office, for three cents a mile, we think this passenger could pay his way to the first ticket-office, and if he failed to get a ticket by reason of the office being closed, he could again board the train and pass for three cents a mile.

There being no error in this charge, under the facts of the case, and the evidence being sufficient to warrant the verdict, the judgment is

*Affirmed.*

*CASON v. HEATH et al.*

1. Where one gave to the maker of a note money to purchase the note from the holder for the person supplying the money, but the maker simply paid the money to the holder and took the note without informing the holder that the money had been sent by him (the maker) to purchase the note, and it did not appear that the holder had any notice of any intention on the part of the first person named, to make a purchase, the transaction amounted in law to a payment and not a sale of the note; to make it a sale required the assent of the minds both of the maker and holder.
2. The maker having thus paid the holder, the security on the note was thereby discharged, although, under the facts of the case, the maker is still liable to the person entrusting him with the money, by reason of the violation of his trust.

December 23, 1890.

Promissory notes. Payment. Contracts. Principal and agent. Principal and surety. Before Judge LUMPKIN. Warren superior court. April term, 1890.

The action was by Cason as bearer and owner, against Heath as maker, and Thompson as security, of the note sued on. After a second verdict for the plaintiff, a new trial was again granted on motion of Thompson.

II. T. LEWIS and EMORY CASON, for plaintiff.

J. S. HOOK and T. E. WATSON, by brief, for defendants.

SIMMONS, Justice.

Under the facts as disclosed by the record, the trial judge did not err in granting a second new trial in this case. Under these facts the plaintiff could not recover. While Cason may have given Heath, the maker of the note, the money for the purpose of purchasing the note from Baker, the holder, for him (Cason), Heath violated his instructions and his trust in not informing Baker, the holder of the note, of said trust. Baker did not know when he received the money from Heath but that it was in payment of the note. Heath did not tell him that Cason had sent the money by him to purchase the note.

Baker must, therefore, have received the money from Heath as payment of the note; under the evidence it was not his intention to sell the note to Heath for Cason. It therefore could not have been a sale of the note by Baker to Heath for Cason. Because to make it a sale required the assent of both the minds of Baker and Heath. Both minds not having assented to the same thing, and Heath, the maker of the note, having carried the money to Baker, the holder thereof, and paid it to him; and he having surrendered the note to Heath, in law it amounted to a payment by the maker. The maker having paid it to the holder, the security on the note (Thompson) was thereby discharged, although under the facts of the case Heath is still liable to Cason, being so bound by reason of the violation of his trust. See *Eastman v. Plumer*, 32 N. H. 238; *Lancy v. Clark*, 64 N. Y. 209; *Burr v. Smith*, 21 Barb. 262; 2 Daniel Neg. Instr. §1221 *et seq.*; Tiedeman on Com. Paper, §371; Brandt on Suretyship, §289; 2 Randolph on Com. Paper, §941.

*Judgment affirmed.*

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McGREGOR v. BENSINGER SELF-ADDING REGISTER CO.

Where the defendant contracted with the plaintiff for the latter to furnish him with a cash-register, for which he agreed to pay \$25 cash and to give notes for eight succeeding payments, and it was agreed that the title to the register should remain in the plaintiff until the notes were paid, and that the defendant should not be entitled to the possession of the register until the first payment should be made and the notes signed and delivered, a subsequent agreement by the plaintiff, on defendant's refusal to sign the notes and make the payment without a previous trial of the register, that he should have it on ten days' trial before so signing or paying, was a change or modification of the original contract; upon his reception and trial of the register the new or changed contract became executed as to both parties, and that it was executed was its consideration. The defendant was therefore entitled to plead the representations as to the register made to him by the plaintiff.

December 23, 1890.



Contracts. Consideration. Pleadings. Before Judge COBB. City court of Clarke county. March term, 1890:

Reported in the decision.

LUMPKIN & BURNETT, for plaintiff in error.

No appearance *contra*.

SIMMONS, Justice.

The Bensinger Self-Adding Register Co. made a contract with McGregor on July 19th, 1889, whereby McGregor contracted for and ordered of plaintiff a wood-case cash-register with automatic adding attachment, for which he agreed to pay \$25 cash and \$15 a month for eight months following the date of the contract. It was agreed that the title to the property should remain in plaintiff until the notes were paid, and the purchaser should not be entitled to the possession of the machine until the \$25 should be paid and the eight notes signed and delivered. There were other stipulations in the contract which it is unnecessary to mention here. The machine was sent to McGregor, but he was required to make a cash payment and sign the notes for the deferred payments before the railroad company would deliver it, or before the bank would deliver the bill of lading. He declined to comply with these terms, and on August 10th, 1889, wrote the plaintiff "that he would not receive it unless the plaintiff would guarantee that the machine was a correct self-adder and perfect in all its workings as represented; if the plaintiff would do that he was ready to receive the machine and do his part, and that he would want a two weeks trial before accepting it." On August 13th the plaintiff replied, "We will guarantee that our register is perfectly reliable and a correct adder; we will have no objection to letting you have the register upon ten days trial." On August 19th the plaintiff wrote the defendant, "As per your request, we notified the rail-

road company to deliver the register to you, and trust this will meet with your approval." It appears that in accordance with this letter, the railroad company delivered the machine to McGregor, and that when he tried it, not being satisfied with it, he refused to accept it, and returned it to the railroad for the plaintiff; and he likewise refused to pay the cash in settlement or to sign the eight notes. Whereupon the plaintiff brought its suit against the defendant on an account and on the contract. The defendant filed the general issue, and also a special plea as follows:

"The consideration of plaintiff's alleged claim was a certain wood-case cash-register with automatic adding attachment. [Plaintiff represented to defendant that said cash-register would register an accurate and correct account of each and every cash sale made and deposited in said register by defendant or his salesmen during each day's business, and would also keep an accurate account of the aggregate amount of said sales so made and deposited each day; and desiring to purchase a register of this kind, and for this work, and relying upon the plaintiff's said representation,] this defendant placed his order for one of said machines. Plaintiff agreed that defendant should take said machine on ten days trial. If the practical operations proved satisfactory to defendant, he was to make the purchase; if not, the machine was to remain the property of plaintiff. In accordance with this arrangement, the defendant did thoroughly and fairly try said machine, and found after a perfectly fair test that it was utterly unsuited to the use intended, in this, that it did not and could not register and keep an accurate and correct account of said sales as represented. Defendant further shows that as soon as he ascertained these facts and before the said ten days had expired, he carefully repacked said machine, and delivered the same, properly marked and directed, to the agent of the Georgia railroad, to be forwarded to the plaintiff, and immediately notified plaintiff of his said action in the premises."

The plaintiff demurred to this plea, and the court sustained the demurrer in part, and struck out of said

plea that part which is above enclosed in brackets, holding and ruling that no representations made prior to or after the signing of the contract could be received in evidence, nor could the defendant prove any modification thereof, because there was no consideration passing from the defendant to the plaintiff for such modification. He also charged this in substance to the jury; and under his charge the jury found a verdict for the plaintiff for the full amount of the plaintiff's claim. The defendant moved for a new trial on several grounds therein stated, among which was the striking of the above portion of this plea and the charge of the court thereon. The motion was overruled, and he excepted.

It will be seen from the above statement of the facts, that after the written contract was signed by McGregor, he refused to pay the money and sign the notes until he had a trial of the machine, the contract being that he was to pay the money and sign the notes before he got possession of the machine. Upon his writing to the plaintiff to this effect, the plaintiff agreed that he might have a ten days trial of the machine, and ordered the railroad company to deliver the machine to him for trial. The defendant accepted this and took the machine on trial, and before the ten days had expired, delivered it to the agent of the railroad company for the plaintiff, and refused to pay the money or sign the notes. We think that when the plaintiff agreed that the defendant might have the machine on ten days trial without paying the money or signing the notes, this was a change or modification of the original contract; and when the defendant received the machine and did try it, the new or changed contract then became an executed contract as to both of them; and this was the consideration for the new contract,—that it was executed. We think, therefore, that the

defendant had a right to plead the representations that were made to him by the plaintiff, which were stricken by the court. It will be seen by reading the plea, that immediately after these representations were pleaded, the defendant went on in his plea to allege this agreement of the plaintiff to allow him ten days trial, and that he did try it and was not satisfied with it. The representations pleaded were not set up as a distinct defence to the original contract, but as a part of that founded on a change of the contract, and as tending to show the reason why the change was made. The original contract as to one element had been abandoned by his agreeing to deliver the machine to the defendant for a ten days trial. The plaintiff had the right, with the consent of the defendant, to alter, change or modify the original contract, and when the defendant accepted the alteration and executed it, that was a sufficient consideration for the new contract, and that part of the old contract which was superseded by the new was abrogated. On the right to modify or change a written contract, or the effect thereof, see *Smith v. Lilley*, 20 Atl. 227.

For the reasons stated, we think the court erred in striking part of the above plea, as indicated, and ruling out the evidence thereunder. *Judgment reversed.*

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SHARPTON v. JOHNSON.

1. General and vague objection to evidence, specifying no ground, presenting no point for adjudication, and not disclosing when it was taken, not considered.
2. The evidence authorized the charge on the subject of notice.
3. The verdict was authorized by the evidence.

December 23, 1890.

Evidence. Practice. Charge of court. Notice. Verdict. Before Judge HUTCHINS. Gwinnett superior court. March term, 1890.

This was a bill, filed on August 1, 1887, to require Richard Sharpton to account to Mrs. Johnson for the proceeds of land to which she claimed a half-interest. She alleged, in brief, that in 1864, her father, James A. Sharpton, was possessed of land worth \$650; that his father, Dennis Sharpton, had bargained with one Robinson for other land at \$500, but was unable to pay for it, and proposed for James A. to take it at \$600, that is, pay Dennis \$100 and pay off Dennis's note to Robinson, and Dennis was to transfer the bond for titles held by him to James A.; that in pursuance of this agreement James A. sold his land to one Wages for \$650 for the purpose of buying the land from Robinson, and Dennis agreed to receive the money from Wages and apply it to the purchase from Robinson, taking the title in the name of James A., who was absent, but he took the title in his own name; that about this time James A. died, and Dennis set up that he had an interest in the land, moved on it, and made some contract with the widow of James A. (she being ignorant and relying on him to protect her interest and that of the complainant) recognizing her title to a half-interest, and holding the title to the remainder in trust for the complainant; that afterwards she surrendered the contract, and he took absolute control of the land, setting up title under the deed from Robinson; that his son, Richard, had notice of all these transactions, but conspired with Dennis to defraud the complainant out of her interest, and procured the widow to execute to them a release of her interest, pretending that she was conveying only a half-interest, whereas she attempted to convey the entire title; that on November 7, 1873, Dennis conveyed to Richard an absolute title to the whole land, worth \$1,000, and he afterwards sold it; and that the facts were kept concealed by him and Dennis from the complainant until the past two years, and though she had

heard that she had some interest, she was unable to ascertain what her rights were.

By his answer the defendant set up that he paid full value for the land without any knowledge whatever of the equities claimed by the complainant, and denying all charges of fraud, combination, etc.

The evidence for the petitioner, as it appears in the record, tended to show the following: James A. Sharpton had two children, one of whom is dead and the other, Mrs. Johnson, is twenty-seven years old. She had no guardian. James A. died October 7, 1863. He owned about 100 acres of land which he sold to Wages for \$625. Dennis Sharpton had purchased lands from Robinson and failed to pay for them, and James A. and Dennis agreed to use the money derived from the sale of the land of James A. to Wages, to pay for the Robinson land (otherwise known as the Fuller place), and that the deed should be made to James A., who died shortly thereafter, and the deed was not made. The widow and children of James A. went into possession of the land, though Dennis remained on it. The widow remained in possession of the place three years, and rented it the fourth year. Dennis handed her a paper, saying it was a deed to part of the land, and she handed it back to him and he gave her \$150 for one half of the place, her interest. Dennis did not set up any claim or title to the place after she went into possession. There was no administration on the estate of James A. She could not say that she ever heard Richard Sharpton say anything about her husband's money purchasing the land, but she knew of the agreement between her husband and Dennis and heard Dennis say what that agreement was, and heard him say several times that when her daughter became of age she could sell the land and get her share. She did not live with Dennis, but lived on the same land in a different house. Den-

nis lived on the land before 1857 and before her husband sold to Wages, and he continued to live on it until he sold it to Richard in 1873. Her husband never loaned Dennis any money. She never gave in the land for taxes, but Dennis gave in for her. She did not remember when she first told her daughter that James A. furnished the money to Dennis to buy the place, but for a number of years she has told her about it. She never had any conversation with Richard about the land. James A. told his mother and father to live on the upper end of the land during their lifetime, and at their death the land to go to the wife and children of James A. James A. was at home when he told his father to go to Wages and get the money. Dennis told Mrs. Johnson that he owed her \$50 that was not paid into the land, of the money he got from Wages. At the time the family of James A. occupied the land Richard was living in the neighborhood. Dennis told Wages that unless he could get the money from Wages above mentioned, and use it in paying for the place he had bargained for, he would lose it, as he had no money. James A. was buried on the place purchased from Robinson.

The defendant testified, in brief: During 1863 and 1864 he was away from home in the army, except for about thirty days in 1864; was not at home when James A. was killed; never heard that any portion of James A's money went into the purchase of the land in question, nor heard any such thing intimated until about the time this suit was commenced; bought the land from Dennis in 1873 for \$850, without any notice or cause to suspect any defect in the title. Dennis lived on the place, using it as his own and exercising ordinary acts of ownership over it, from the time he first went there, about 1856, until defendant bought it in 1873, making crops on it from year to year. Defendant never told Coker that

his father's transactions were illegal in the sale of the land, nor anything of the kind; he did not remember that he had any conversation with Coker about the land; did not ascertain what had been done with James A's place, except to learn it had been sold; did not learn what had been done with the proceeds, and does not know that he inquired as to that; had about as much as he could do to look after himself and family; never had any cause to suspect that the proceeds of James A's place had been invested in the Fuller place, nor had any intimation of such thing; was friendly with his father, James A. and family, and they visited each other; never heard what had been done with the proceeds of James A's place. When he went to buy from his father, he saw he had the deed and knew he had been occupying and using the place for many years as his own; did not examine the title further; thought it was all right; sold the place for what it was worth; did not inquire, after James A. was killed, as to the condition of the widow and daughter; had other things to do; knew when he went off to the army in 1862 that his brother owned the tract which was sold to Wages, and that his father had bargained for the land in question from Robinson and had a bond for title. When he was at home in 1864 he visited the family of James A., whom he knew had been buried on the land. No one had been buried there before. When defendant first came home in 1865, the family of James A. and Dennis and his family were living on the land, and defendant for two years lived within three miles and then moved to within one, visiting both families frequently.

In evidence appeared a warranty deed from Robinson to Dennis Sharpton, dated March 15, 1865, and reciting a consideration of \$311; also the deed under which the defendant holds, dated November 7, 1873, reciting a consideration of \$855, and that it was be-



tween Dennis Sharpton and Richard Sharpton, and signed by Dennis and Jane Sharpton. The name of the wife of James A. Sharpton is Clara.

The jury found for the complainant \$427, with interest from November 7, 1873. The defendant moved for a new trial upon the following grounds:

(1) Error in admitting the following testimony of Coker, over the objection of the defendant, it not appearing that defendant had the knowledge or notice therein referred to, previous to or at the time of his purchase: "I heard defendant, Richard Sharpton, say that his father's transaction in the sale of the land was illegal. His excuse was, that his brother, James A., did not have a deed for it; he did not see how they could collect it out of him; that if his father had left any property at his death, he, the complainant, could have collected it. He was neither guardian nor administrator."

(2) Error in charging: "In the absence of proof of actual notice, notice may be chargeable to a party in another way, when any fact comes to the party's knowledge which indicates that there is some trouble with the title he is about to buy, that some other person other than the holder of the deed claims title or an interest in it, and is such as would naturally put a man of ordinarily reasonable care and diligence on enquiry as to the true state of the title; it is his duty to investigate and to use ordinary care and prudence and diligence in it, and he is chargeable with notice of the facts that such enquiry discovers to him, or would reasonably have discovered." (To the charge here complained of the court added: "Whether or not there were facts or circumstances known to defendant at the time or before he purchased the property, requiring him to make enquiry under this rule, and if so, what such enquiry would have probably discovered, the jury must determine.")

(3) Verdict contrary to evidence, etc.

The motion was overruled, and defendant excepted.

W. E. SIMMONS and S. J. WINN, for plaintiff in error.

T. M. PEEPLES, *contra*.

SIMMONS, Justice.

The official report of this case discloses the facts and sets out the grounds of the motion for a new trial.

1. The first ground of the motion is that the court erred in admitting the evidence of Coker over the objection of the defendant. We cannot consider the first ground of the motion, because it is a mere general objection to the evidence without specifying any ground therefor; it is too vague and does not present any point for adjudication. It does not say what the objection was or when it was made, whether made at the trial or put in afterwards in the motion for a new trial.

2. There was no error in the charge complained of in the second ground of the motion. It was insisted before us that there was no evidence to authorize it. After reading the evidence carefully, we think there is abundant evidence to authorize the judge to give this principle in charge to the jury, and the principle charged is in accordance with former rulings of this court. *Jordan v. Pollock*, 14 Ga. 145; *Urquhart v. Leverett*, 69 Ga. 98; *Johnson v. Dooly*, 72 Ga. 297.

3. The verdict of the jury was fully authorized by the evidence.

*Judgment affirmed.*

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LANGFORD *et al.*, administrators, *v.* NABERS *et al.*

HUBBARD *et al.* *v.* BROOKS *et al.*

To open a decree that an intestate made no advancements to any of his children in his lifetime, a newly discovered "memorandum of donations" to his children, in his handwriting and dated twenty-five years before his death, but to which he had never called the attention of any of his family, is not sufficient.

December 23, 1890.

v 8C-29

Evidence. Advancements. Gifts. Before Judge WELLBORN. Hall superior court. January adjourned term, 1890.

In 1886 Langford and Hubbard, as administrators of D. K. King, by their bill alleged that King when he died left a considerable estate, and left as his heirs at law thirteen children and representatives of children, naming them, one of them being Mrs. Hubbard and another Mrs. Langford; that the administrators had paid all the debts of the estate and had paid the widow her year's support, and she had taken dower; that they had on hand for distribution among the heirs a considerable sum of money, but some of the heirs complained that the deceased in his lifetime made to certain of his children advancements greatly in excess of what he advanced to others, and that all the children should be made equal before any division of the estate is made, while others of the heirs insisted that such property as they received from their father in his lifetime was a gift and not an advancement, and that the money in the administrators' hands should be divided equally between the heirs; that according to the best of the knowledge, information and belief of the administrators, the children of the deceased received from their father in his lifetime various sums and property (setting them forth, the statement made showing that some of the children received much more than others, Mrs. Hubbard and Mrs. Langford being among those who received least); that the administrators had not found among the effects of deceased any entry or charge against any of the children as advancements or gifts, but, on account of the complication mentioned, were at a loss to know what to do, and so prayed for decree requiring that each of the children or representatives of children answer what money or property he or she received from deceased in his lifetime, and interplead

touching their various claims, and directing the administrators touching the distribution of the estate, and determining the question as to advancements. The answers of the different defendants all denied that any gift received from King was by way of advancement. Some of them alleged that King did not keep any memorandum of what he had given to them, nor did he ever charge or intend to charge them with such things as advancements. One insisted that each of the heirs should account for whatever they might have received, so that each might receive only an equal amount after accounting. From the various answers it appeared that King gave to Mrs. Hubbard \$150 in cash; to Mrs. Langford a mule, two cows and a calf; to Mrs. Espy a small negro girl, a colt and a cow; to David King something, but how much did not appear; to Mrs. E. Gilmer a negro, a horse and \$30; to Mrs. M. Gilmer \$120; to Mrs. Martin (whose children are parties) a negro; to Mrs. Nabers a cow and calf, a horse, a pig, two sheep and a bee-gum; to Mrs. Gwinn \$150; to Mrs. Brooks \$200; and to Mrs. Sewell a horse, a cow, a small negro boy, and an old mule. As to various household goods which it was charged that the defendants had received, they generally alleged that such goods were the product of their own work and belonged to them.

On February 25, 1887, it was decreed that King made no advancements to any of his children in his lifetime, to be charged as such in the distribution of his estate, and that the estate in the hands of the administrators, after paying debts, etc., should be equally divided among the heirs at law.

In January, 1888, the administrators filed another petition, in which they alleged that on the 23d of December, 1887, they had discovered a memorandum-book containing the following entries in the handwriting of the deceased:

“ April 16th, 1859.

“ A memorandum of donations made by D. K. King to his children :

John S. Arnold.....	\$225 00
Cicero C. Brooks.....	225 00
do .....	75 00
do .....	100 00
Also one mule.....	100 00
John N. King.....	500 00
I. J. Martin. ....	600 00
April, 1859.	
James Sewell.....	700 00
Also one mule.....	75 00
November, 1859.	
Winey E. Gilmer.....	650 00
December 12, 1859.	
James M. King.....	437 50
David King.....	437 50.”

The administrators believe, as do others who have seen these entries, that the deceased meant, by donations to his children, that he had delivered to them the respective sums intending that each of his children not mentioned should receive a like amount before those mentioned should receive more, especially in view of the fact that he did give to each of his children \$150 of which he made no entry in the book. This book was found in the home of the deceased in the possession of his widow, who thought it was the records of a church of which he was a member and keeper of the records. The heirs at law who are not mentioned in it as having received any sum from deceased, have notified the administrators not to make any further distribution in pursuance of the decree, but to require the heirs at law mentioned in the book to account for the sums charged to them. The prayer is that, if it be determined that the book-entries are evidence of legal advancements to be accounted for by those against whom they appear, the former decree be so modified as to conform to the facts.

Mrs. Hubbard and Mrs. Langford filed answers in the nature of cross-bills, alleging their belief that the deceased fully intended that said donations should be held and charged against all said children as advancements out of his estate; that he would not have charged anything to his children that they did not get, nor would he have charged any more than the property was worth; and that each of the children mentioned in the memorandum received, in addition to the amount therein charged, as much as the property received by Mrs. Hubbard and Mrs. Langford each, who pray that those mentioned in the memorandum be compelled to account for all the property charged to them in the memorandum, and be decreed to refund to plaintiffs all money that they have received from them over and above their *pro rata* share, after accounting fully for the advancements, and that Mrs. Hubbard and Mrs. Langford each receive her distributive share according to equity and good conscience.

The bill and cross-bills were dismissed, and exceptions were taken.

J. B. ESTES, for the administrators.

PERRY & DEAN and HARRISON & PEEPLES, for plaintiffs in cross-bill.

W. L. MARLER, M. L. SMITH, S. C. DUNLAP and G. K. LOOPER, for defendants.

SIMMONS, Justice.

Under the facts as alleged in the pleadings in this case, the court did not err in dismissing the bill. The newly discovered evidence consists of certain entries made by King, the father of the litigants, in a memorandum-book which was found after the decree was rendered on the first trial of the case. That memorandum is headed: "April 16th, 1859. A memorandum of donations made by D. K. King to his children." Then follow several entries of donations made to his

different children in April, November and December, 1859. This on its face appears to be a memorandum of gifts made by the father to his children, instead of advancements. He calls it a "donation" and not an "advancement." See Code, §2580. There is no other fact alleged in the bill which would tend to show that the father intended this as an advancement, except it is alleged that the other amounts received by his children in the first bill were not charged in this memorandum or in any other writing which had been found. It is claimed, however, by counsel for the plaintiffs in error that this was a matter to be submitted to the jury and not a matter to be decided by the judge. If he had submitted it to the jury, it is not certain or sure, under the allegations in the bill, that the jury would have found that the amounts entered in this memorandum were intended as advancements and not as gifts. The court was as fully competent to determine whether the word donations meant advancements, as the jury would have been. This memorandum having been made in the year 1859, and the father having lived (as we can infer from the pleadings in the case) up to the year 1884 or '5, and never having called the attention of his family to the memorandum,—taking this fact and all other facts as disclosed by the pleadings into consideration,—we think the court did right in dismissing the bill and in allowing the first decree in the case to stand.

The bill filed by the administrators to open the decree in this case having been properly dismissed, there was no error in dismissing the answers of two of the defendants, filed by them in the nature of cross-bills.

*Judgment affirmed.*

## THE MAYOR AND COUNCIL OF MARIETTA v. ALEXANDER.

86 455  
1109 149

An affidavit on which is issued a warrant for arrest for violating whisky sections of a city ordinance, failing to state how these sections are violated but simply quoting the sections of the ordinance, is defective.

December 23, 1890.

Municipal corporations. *Certiorari*. Practice. Before Judge GOBER. Cobb superior court. March term, 1890.

The city marshal of Marietta made affidavit "that Tom Alexander hath been guilty of a violation of the following special whisky section of city ordinance, secs. 77, 78 and 78a [quoting the sections in full]; said violation being within the corporate limits of said city, on the 25th day of December, 1889." Upon this affidavit the mayor issued a warrant for the arrest of Alexander, reciting that "complaint upon oath has been made . . . that Tom Alexander did violate the special whisky section of city ordinance as specified and incorporated in the above warrants hereunto attached," etc. In the mayor's court Alexander moved to dismiss the case because the affidavit did not state any fact and there was no specification in the warrant. His motion was overruled, and after conviction he carried the case to the superior court by *certiorari*. The judge held that the mayor's court erred in not sustaining the motion to dismiss, and that the evidence showed, if anything, a sale of whisky, to punish which the city had no right.

C. D. PHILLIPS and J. Z. FOSTER, for plaintiff in error.  
J. E. MOZLEY, *contra*.

SIMMONS, Justice.

Alexander was tried and convicted before the Mayor and Council of Marietta for violating certain special whisky sections of the city ordinance. The affidavit on which the warrant was issued fails to state how and



in what manner these sections were violated, but simply quotes the section of the ordinance. Alexander carried the case by *certiorari* to the superior court, where, upon a hearing by the judge of that court, the *certiorari* was sustained and a new trial ordered. To this ruling of the trial judge the mayor and council excepted, and brought the case here for review. When the case was called in this court, counsel for the defendant in error moved to dismiss the same, upon the ground that, the case being a criminal case, the mayor and council had no right under the law to sue out a writ of error and thereby have the decision of the trial judge reviewed in this court.

If Alexander had been acquitted, it would be clear to our minds that the mayor and council could not have a *certiorari* or a writ of error to review the trial, but having been convicted and having obtained a new trial on a writ of *certiorari*, it presents a more difficult question. No authority was cited in the argument by counsel on either side as to the right of the mayor and council to sue out a writ of error reviewing the action of the superior court in granting a new trial upon *certiorari*. In our investigation of the subject we find that three cases of the kind were brought to this court and reviewed here, to wit: *Mayor, etc. v. Lumpkin*, 5 Ga. 447, *Mayor, etc. v. Arnold*, 30 Ga. 517, and *Mayor, etc. v. Charlton*, 36 Ga. 460; but it appears from the record in these cases that no motion to dismiss them on this ground was made, and the court did not pass upon the question now under consideration. It being a very important question to the incorporated towns and cities of this State, we will not decide it now, inasmuch as we have looked into the merits of the case and find that the judgment of the trial judge was correct and should be affirmed. See *Mayor, etc. v. Cranston*, 61 Ga. 572; Bayliss on New Trials and Appeals, 296.

*Judgment affirmed.*

VANCE & KIRBY v. ROBERTS, sheriff, *et al.*

1. On rule for distribution of a fund arising from the sale of a debtor's property, an issue tendered by mortgagees against others of equal date, that the mortgage of the latter was intended by the mortgagor to be inferior in dignity to that of the former, and that he instructed the person who drew the mortgage to make it so appear therein, relied upon his doing so and refused to make any mortgage to the creditors attacked except it should expressly be subject to the mortgage of the creditors tendering the issue, but that the scrivener, through accident, mistake or fraud, omitted to follow this direction,—was properly stricken on demurrer, because it was an effort to reform the mortgage without making the mortgagor a party.
2. An issue alleging that the debtor had delivered to the mortgagees sought to be postponed, as collateral, solvent notes and mortgages aggregating a large sum, and that these were in the possession of said mortgagees and had been or could have been collected by the exercise of proper diligence, was properly stricken on demurrer. The mortgagees could not be charged with the collaterals unless they had collected them. If not collected, the collaterals would still be assets of the debtor and subject to the claims of any of his creditors after those to whom he delivered them had been paid; and there is no allegation that any of them were lost by reason of a failure to collect.
3. That the mortgagees sought to be postponed had a defeasible deed to certain realty from the debtor, would not compel them to relinquish their lien upon the money in the hands of the sheriff to be distributed, and to proceed against the land, they having no judgment lien against it, and it not appearing that the deed to them contained a power authorizing them to sell the land for the purpose of paying their debt. Although they held a lien against the land, and certain notes and accounts as collateral, these did not constitute an ultimate fund equally as accessible to them as the money in court. And although it was alleged against them that they were in possession and had received rent for the land since the date of the deed, the issue tendered did not set up any distinct claim to have the rent applied to their debt, nor aver that it had not been so applied, or that it was not embraced in the payments set up in the issue which was allowed to stand.
4. That there is a variance in the amount stated in the mortgage and that stated in the affidavit for foreclosure, does not make the foreclosure void. If the amount claimed in the affidavit be too large, the defendant or an opposing creditor can contest the amount and have it reduced.

86	457
119	596
86	457
130	354

5. The verdict not covering the issue which the jury were empanelled to try, it was the duty of the court to send them back to their room that this issue might be passed upon by them.

December 23, 1890.

Money rule. Mortgages. Debtor and creditor. Evidence. Verdict. Before Judge MILNER. Bartow superior court. January term, 1890.

Reported in the decision.

F. A. CANTRELL and J. A. BAKER, for plaintiffs in error.

J. W. AKIN and J. H. WIKLE, *contra*.

SIMMONS, Justice.

Mary A. Bibb brought her rule against the sheriff of Bartow county for the distribution of funds in the hands of the sheriff arising from the sale of certain personalty of B. F. Bibb, under the levy of a *fi. fa.* in her favor, and of certain mortgage executions on the property. To this rule Moore, Marsh & Co., mortgage creditors, and Vance & Kirby, also mortgage creditors, of B. F. Bibb, were made parties. The *fi. fa.* of Mrs. Bibb was allowed to be paid, and the real contest is between the mortgage creditors mentioned. Vance & Kirby contested the right of Moore, Marsh & Co. to participate in the distribution.

1. The first issue made by Vance & Kirby against Moore, Marsh & Co. was, in substance, that Moore, Marsh & Co. should not participate equally with Vance & Kirby in the distribution, because, although the two mortgages were of equal date and both written by Ashford, one of the firm of Moore, Marsh & Co., Vance & Kirby's mortgage was written first by Ashford, and after its execution and delivery, Ashford was instructed by Bibb to write a mortgage for Moore, Marsh & Co. upon the same property, having the mortgage to express that it was subject to and inferior in dignity to the mortgage of Vance & Kirby; and that Bibb relied

implicitly upon Ashford to write the mortgage as instructed, and positively refused to make Moore, Marsh & Co. any mortgage except as should be made expressly subject to the mortgage of Vance & Kirby; and that when Bibb signed the mortgage to Moore, Marsh & Co. he thought it contained a clause making it subject to the mortgage of Vance & Kirby; but that Ashford, either through accident, mistake or fraud, omitted to make the mortgage of Moore, Marsh & Co. subject to that of Vance & Kirby, and therefore the mortgage of Moore, Marsh & Co. should not in equity be allowed to gain a dignity it would not otherwise have, but should be held inferior in lien to the mortgage of Vance & Kirby. This issue was stricken by the court upon demurrer, and Vance & Kirby excepted. We think the court did right in sustaining the demurrer. It was an effort on the part of Vance & Kirby to reform a mortgage-deed made by Bibb to Moore, Marsh & Co., without making Bibb a party thereto. While the charges made by Vance & Kirby against Ashford may be true, we do not know but that Bibb, the maker of the mortgage, is satisfied with it as it stands; and as far as appears from the record he is satisfied, as he was not made a party, and it does not appear that he requested the court that he should be made a party. We do not see how the written contract made between him and Moore, Marsh & Co. could be changed without his consent or without his being made a party to the pleadings.

2. The second issue made by Vance & Kirby was, that Moore, Marsh & Co. had received payments on their mortgage, amounting in the aggregate to \$400, for which they had given no credit. This was also demurred to and the demurrer overruled, and it was allowed to stand as an issue between the parties.

3. The third issue made was that Bibb had delivered to Moore, Marsh & Co., as collateral, solvent notes and

mortgages aggregating \$600 or other large sum, and that the amounts and dates and time when payable were unknown to Vance & Kirby, but the notes and mortgages were in the possession of Moore, Marsh & Co., and had been collected or could have been by the exercise of proper diligence. This also was stricken on demurrer. There was no error in sustaining the demurrer to this issue. It was too vague and uncertain to submit to a jury. If it had alleged positively that the collaterals had been collected by Moore, Marsh & Co., it would have been a good plea or issue, and the court would not have stricken it, as he refused to do as to the second issue above referred to; but when the plea was that the collaterals had been or could have been collected, it was bad; because if the collaterals had not been collected by Moore, Marsh & Co. they were merely held as collaterals, and Moore, Marsh & Co. could not be charged with the collaterals unless they had collected them. If not collected, they held them as they would any other security which Bibb might have given them, and Vance & Kirby had no right to insist that securities which Moore, Marsh & Co. may have obtained from Bibb should be credited on their mortgage, unless they had collected the securities. If not collected, they would still be assets of Bibb, and would be subject to the claims of any of Bibb's creditors after Moore, Marsh & Co. had been paid. There was no allegation that any of them were lost by reason of a failure to collect.

4. The fourth issue filed by Vance & Kirby was, in substance, that to secure the same debt to Moore, Marsh & Co., Bibb had made them a deed conveying certain realty, taking from them a bond to reconvey upon the payment of his indebtedness to them. This realty was worth \$3,500, and \$20 per month rent, which rent they had been receiving since the date of the deed, and were

in possession of the land. Vance & Kirby had no lien or claim on this realty, but Moore, Marsh & Co. had an exclusive lien upon it. Vance & Kirby therefore prayed that Moore, Marsh & Co. be compelled to go upon the realty and the notes and accounts alluded to in the last issue, upon which they had an exclusive lien, and that the funds in the hands of the sheriff be applied to the debt of Vance & Kirby. This also was stricken on demurrer.

Our code, §1949, declares: "As among themselves, creditors must so prosecute their own rights as not unnecessarily to jeopard the rights of others; hence, a creditor having a lien on two funds of the debtor equally accessible to him, will be compelled to pursue the one on which other creditors have no lien." It is argued by counsel for the plaintiff in error that, under this section, Moore, Marsh & Co. should have been compelled by the court to relinquish their lien upon the money in the hands of the sheriff and in court for distribution, and proceed against the land and notes and accounts which they had as collateral, and that the court therefore erred in sustaining the demurrer to this plea. We do not think so, under the facts in this case. The facts show, that Moore, Marsh & Co. had a defeasible deed to certain realty, and some notes and accounts as collateral. They had no judgment lien against the land. Nor does it appear that the deed which Bibb made to them to the land contained a power of sale authorizing Moore, Marsh & Co. to sell the land for the purpose of paying their debt. Nor were the notes and accounts sued to judgment and that judgment levied, the property sold and the money brought into court. We do not think that under these circumstances equity would compel Moore, Marsh & Co. to relinquish their lien upon the money in the hands of the sheriff in court to be distributed, and compel them to proceed

against the land and to bring suits on the notes and accounts. Although Moore, Marsh & Co. had liens upon the land and notes and accounts, these did not constitute an ultimate fund equally as accessible to them as the money in court. There was no error, therefore, in dismissing this issue upon demurrer. See *Plant v. Gunn*, 7 Fed. Rep. 751, decided by Mr. Justice Woods of the Supreme Court of the United States upon facts similar to the facts of this case. As to the rent, the issue tendered did not set up any distinct claim to have it applied to the debt of Moore, Marsh & Co., nor did it aver that it had not been so applied, or that it was not embraced in the payments set up in the issue of payment which the court allowed to stand.

5. During the progress of the trial, Moore, Marsh & Co. tendered their mortgage, which recited that it was given to secure an indebtedness of \$3,217.15; also the affidavit of foreclosure upon this mortgage, which alleged that Bibb was indebted to them \$3,651.78 principal, \$216.59 interest, and \$386.83 attorneys' fees; and also the *fi. fa.* issued thereon, for the amounts specified in the affidavit of foreclosure. To the introduction of the mortgage, affidavit and *fi. fa.* Vance & Kirby objected on the grounds that the mortgage showed on its face that it was given to secure an indebtedness of \$3,217.15 as principal, and the foreclosure was for \$3,651.78 principal, and interest, and attorneys' fees on the latter amount. This objection was overruled, and Vance & Kirby excepted. The fact that there was a variance between the amount claimed in the affidavit of foreclosure of the mortgage on the personalty, and the amount stated in the mortgage, does not in our opinion make the foreclosure void. If the amount claimed in the affidavit is too large, the defendant in the mortgage or the contesting creditor, as in this case, can contest the amount claimed and have it reduced if

it is too large. This was one of the issues tried in the case, and the jury by their verdict reduced the claim made in the affidavit nearly \$1,000. There was no error, therefore, in admitting the mortgage, affidavit and *fi. fa.* in evidence before the jury.

6. The next error complained of is, that when the jury returned a verdict, "We, the jury, find on the issue in favor of Vance & Kirby," the judge ordered the jury to retire and find what amount, if any, was due upon the mortgage of Moore, Marsh & Co.; whereupon the jury retired and brought in the following verdict: "We, the jury, find on mortgage in favor of Moore, Marsh & Co., principal \$2,678.22, interest \$452.03, attorneys' fees \$267.82." The court did right in sending the jury back to their room to find what was due upon Moore, Marsh & Co's mortgage. That was the real issue which they were empanelled to try. Their first verdict did not cover this issue, and it was the duty of the court to have the issue passed upon by them and to send them back to their room in order that this might be done.

*Judgment affirmed.*

FARRAR v. BRACKETT.

1. On the trial for an action for damages for instituting a suit in trover maliciously and without probable cause, it was not error for the court to charge that "if the bail-trover case was brought in bad faith, and was unfounded and malicious, the jury could give to the plaintiff reasonable counsel fees for defending that suit."
2. In the trover suit the jury having found that the plaintiff therein had no right or title to one of the mills sued for, and having required him to return it to the opposite party, it was proper that he should pay a reasonable rent for the mill while in his possession. The jury might give the highest or lowest amount proved, or any intermediate amount.
3. To make the failure to charge as requested reversible error, the request must be in writing as required by the rule of the superior court.

86	463
88	796
88	463
92	721
86	463
105	378
86	463
113	970
113	1161
86	463
117	517
96	463
118	384
118	916



4. The suit being for a tort and the damages caused thereby, and there being but one count in the declaration, the rent or hire was alleged simply as a part of the damages.
5. A charge not authorized by evidence should be refused.
  - (a) The transfer without recourse of notes given for part of the price of a mill, did not place the title to the mill in the person taking the notes, because when the person transferring them received the money thereon, he was paid, and the title to the mill passed into the maker of the notes, of whom the purchaser of them was but an ordinary creditor. This purchaser was, therefore liable to him for the full value of the mill for rent while illegally in possession of the purchaser. The question of the right of possession was settled by the verdict in the trover suit.
6. The declarations of an attorney made during the pendency of a case, out of the presence and hearing of his client, are not admissible to prove malice on the part of the client.
  - (a) The verdict is sustained by the proof of special damages alone, but the amount allowed for attorney's fees is too large. If the plaintiff will write off the sum of \$80, the judgment will stand affirmed; otherwise, a new trial is granted.

December 23, 1890.

Malicious suit. Attorneys' fees. Charge of court. Practice. Damages. Verdict. Evidence. Before Judge MILNER. Whitfield superior court. October term, 1889.

Reported in the decision.

W. K. MOORE, for plaintiff in error.

T. R. JONES and R. J. & J. McCAMY, *contra*.

SIMMONS, Justice.

It appears from the record in this case that in April, 1886, Farrar sued Brackett in bail-trover for a steam-engine and two saw-mills, one a "Wheeler mill," and the other a "Hill mill." Brackett not being able to give the security required by the code in cases of bail-trover, Farrar gave security and took possession of the property. On the trial of the case in August, 1888, Farrar recovered the engine and Wheeler mill, and Brackett recovered the Hill mill. In September, 1888, Brackett brought his action against Farrar for damages, alleging that Farrar "instituted the action of trover for a

saw-mill and fixtures maliciously and without probable cause, and had bail-process issued, and under it the mill and fixtures were seized," etc., and that Farrar having obtained possession of the mill and fixtures, converted the same to his own use, and received rent therefor during the time he was in possession of the mill, and otherwise damaged said mill. The jury returned a verdict for the plaintiff, and the defendant moved for a new trial, which was refused, and he excepted.

1. There was no error in charging as complained of in the motion for a new trial, that "if the bail-trover case was brought in bad faith and was unfounded and malicious, the jury could give to the plaintiff reasonable counsel fees for defending that suit." Our code, §2942, expressly declares that if the defendant has acted in bad faith, the jury may allow counsel fees.

2. Nor was there any error, under the facts of this case, in charging "that if the property was in the possession of Farrar during the pendency of the trover suit, and he used it or allowed others to use it, the plaintiff would be entitled to reasonable rent or hire for the time it was in his possession." The jury having found in that suit that Farrar had no right or title to the Hill mill, and by their verdict required Farrar to return it to Brackett, we think it was right and proper that Farrar should pay a reasonable rent for the Hill mill while in his possession. And the court did right in charging the jury on the subject of rent, that they might give the highest or lowest amount proved, or any intermediate amount; which charge is complained of in the next ground of the motion.

3. Nor was it reversible error to fail to charge upon a collateral matter, as complained of in the latter part of this ground. To make the failure to charge a request reversible error, the request must be made in writing, as required by the rules of the superior courts.

4. Nor was the verdict illegal, as complained of in the next ground. The suit was for a tort and the damages caused thereby, and there was but one count in the declaration; and the rent or hire was alleged simply as part of the damages. We know of no rule of pleading in actions of tort which would prevent the plaintiff from alleging general damages for a malicious suit and the special damages occasioned him by the suit.

5. The court did right in refusing to charge as requested by the defendants, "that if Farrar purchased from Robert Hill the five promissory notes, and at the same time bought Hill's right and title, the plaintiff would not after that be entitled to recover full rents without paying or offering to pay balance of purchase money due." We have searched this evidence carefully, and cannot find sufficient evidence to authorize this charge. We find no evidence that Farrar purchased from Hill his right and title to the mill, but only that he purchased from Hill five notes, and that Hill transferred them to Farrar without recourse. The transferring of the notes by Farrar to Hill without endorsement or guaranty, did not place the title that Hill had to the mill in Farrar, because when Hill received the money from Farrar on the notes and transferred them to him, Hill was paid, and the title of the mill passed into Brackett, and Farrar, the purchaser, was only an ordinary creditor of Hill. *Carhart v. Reviere*, 78 Ga. 173; *Hunt v. Harbor*, 80 Ga. 746. The title to the mill, therefore, being in Brackett, he had the right to recover the full value of the mill for rent while illegally in the possession of Farrar, without offering to pay Farrar what he owed him on the notes purchased from Hill. Moreover, the verdict of the jury in the trover suit settled the question of the right to possession in favor of Brackett and against Farrar.

6. Pending the trial of the case in the court below,

the plaintiff, over the objection of the defendant, introduced in evidence certain sayings or declarations of W. C. Glenn, attorney for Farrar, made in the courthouse during the pendency of the trover suit in Murray county; and this is complained of in the 6th ground of the motion. We think this ruling of the court admitting these declarations was erroneous. It was argued before us that they were admissible because they tended to show malice on the part of Farrar in suing out the bail-process. It was not shown that Farrar was present at the time the declarations were made, or that he ever ratified them. And we cannot see how the declarations of an attorney made during the pendency of the case could be admissible to prove malice on the part of his client, especially as it appears that the client did not hear them and was not even present at that term of the court. If we could ascertain from the record that this testimony increased the damages one dollar against the defendant, we would grant a new trial on this ground; ~~but~~ we find that, leaving out the question of general damages ~~entirely~~, the verdict is sustained by proof of special damage. It ~~appears~~ that Farrar kept the Hill mill in his possession about two years and four months, and the preponderance of the testimony is that the mill was worth \$15 per month during that time; besides, there were some portions of the mill which Farrar did not return. We therefore would not reverse the case upon this ground alone; but under the evidence we think the jury allowed too large an amount for attorneys' fees. The only witness who testified about the value of those fees testified that the defence of the suit in Murray county was worth \$100. It will be remembered that in that suit Farrar recovered the engine and the Wheeler mill. They were worth from \$1,800 to \$2,000. Brackett recovered the Hill mill, which was worth about \$275. The jury having found that Farrar

was entitled to the engine and mill, worth from \$1,800 to \$2,000, and that Brackett was only entitled to the mill worth \$275, the jury should not have allowed him in this suit to recover attorneys' fees for defending that part of the suit which he lost. And as the property which he failed to recover was worth more than six times as much as the property he did recover, and as the proof showed that the service as to both pieces of property was worth \$100, and the jury having found \$100 attorneys' fees for the case in Murray county, when he was not entitled to that sum under the facts of the case, we grant a new trial in this case. If, however, Brackett and his counsel will voluntarily write off from said verdict the sum of \$80, within thirty days from the time this judgment is made the judgment of the court below, the judgment will stand affirmed.

*Judgment reversed on condition.*

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LAREY v. BAKER.

If a husband as agent for his wife consulted the defendant as an attorney, and employed him to purchase an outstanding interest in a certain execution against her, and in this employment disclosed to the attorney his whole scheme of compromise and his purpose to purchase another execution against her at a price which the holder of it had agreed to take, and his general purpose to compromise all of his wife's debts, the attorney could not take advantage of the information thus derived so as to purchase the outstanding interest in the first named execution for himself, and could not rightfully purchase the other execution for other persons, although the husband did not employ him to purchase the latter execution; and if he subsequently purchased the latter execution from the persons for whom he had bought it, the trust would attach to it in his hands.

(a) Where an agent or attorney is unfaithful to his trust or violates his instructions, he is not entitled to any compensation.

December 23, 1890.

Attorney and client. Trusts. Before R. J. McCAMY, Esq., judge *pro hac vice*. Bartow superior court. January term, 1890.

86	468
116	400
86	468
124	178

Reported in the decision.

AKIN & HARRIS and J. M. NEEL, for plaintiff.

C. D. McCUTCHEN, for defendant.

SIMMONS, Justice.

Mrs. Larey, formerly Mrs. Deweese, filed her petition against Baker, making in brief the following allegations: On January 25th, 1875, Waitzfelder & Co. obtained a judgment against her; on January 12th, 1876, Meador Brothers obtained a judgment against her. Afterwards she married Larey, and they determined to attempt to compromise all debts outstanding against her, and he opened negotiations with some of her creditors or their attorneys. The judgment of Waitzfelder & Co. was controlled by Murphey as their attorney, and he claimed to have authority to compromise. Previous to November 1st, 1887, the petitioner, through her husband, made an agreement with Murphey to compromise the Waitzfelder debt for \$150. The *fi. fa.* of Meador Brothers had been transferred to Silva and Peacock for considerably less than its face value, and the petitioner had an understanding, through her husband, with Peacock, to compromise his interest in the *fi. fa.* at between \$80 and \$90. Silva was a stranger to Larey, and he did not know how to approach Silva for a compromise, but intended to open negotiations with him through some attorney or friend. Pending this state of negotiations, Larey was advised by W. C. Baker to call on his brother, J. A. Baker, the defendant, for legal advice concerning the claims, the latter being a lawyer. Acting on this recommendation, Larey did call upon the defendant for advice, and the defendant elicited from him all the facts and what he had been trying to do, and the arrangements he had made with Murphey and Peacock. In the course of the confidential communication Larey had with the defendant, he told the defendant of the difficulty he was under in ap-

proaching Silva for a compromise; and the defendant said he knew Silva well and could easily manage that for the petitioner, and Larey engaged his services to to assist her in getting control of Silva's interest in the *fi. fa.* at a discount, for her benefit, and in furtherance of her general purpose of compromising all of her outstanding debts. She expected to pay him a reasonable fee for his services, and relied upon him as her friend and attorney to assist her in the matter. Baker asked Larey to call again in a few days, by which time he would accomplish what he had engaged to do. Larey did call in a few days, and to his astonishment learned that instead of doing what he had agreed to do, Baker had bought both of the *fi. fas.* for his own benefit; that is, he had bought Silva's interest in the Meador Brothers *fi. fa.*, and had bought the Waitzfelder & Co. *fi. fa.*; against which purchases Larey then and there protested. He bought from Murphey the *fi. fa.* of Waitzfelder & Co. for \$150, and had it nominally transferred to Baker & Hall, and shortly afterwards took the transfer of the *fi. fa.* from Baker & Hall to himself. The petitioner offered to pay Baker what he had paid for the two *fi. fas.*, with eight per cent. interest, and a reasonable sum as compensation for his services in securing the *fi. fas.*, though she believes he is entitled to no compensation; but Baker refused to accept the offer, and stated that he would accept nothing less than \$450. She tenders him principal and interest of what he claims he paid, and ten dollars for his services. The petition then charges various attempts made by Baker to subject different portions of the petitioner's property, etc. It prays that the defendant be decreed to be the holder of the *fi. fa.* in trust for her; that he be compelled to accept the sum offered by her in satisfaction of the money expended by him for the *fi. fas.*, with interest, and that he be restrained from pressing the *fi. fas.*, and that they may be decreed cancelled.

Baker answered, in substance, that he knew nothing of any negotiations or understanding between the petitioner and Murphey, or between the petitioner and Peacock or Silva. He denied that Larey ever called on him for any advice or counsel in relation to the judgments in question or the compromise, or that he elicited from Larey any facts about the petitioner's case, or what Larey had been trying to do, or the arrangements he had made with Murphey or Peacock; or that Larey had employed him or proposed to employ him, or asked of him any advice or opinion, either as a lawyer or otherwise, in relation to the *fi. fas.* or the compromise of them in any way; or that he gave Larey any opinion as counsel, for he (defendant) was at that time the attorney of Silva. Nor did he undertake in any character to compromise for the plaintiff or assist in any way to compromise the *fi. fas.* or any of them, or betray any confidence reposed in him by the plaintiff or her husband, or take advantage of any confidential communications. He bought Silva's interest, but in so doing he was not guilty of any breach of duty or good faith. Waitzfelder & Co's *fi. fa.* was really bought for Baker & Hall, and the defendant had no interest in the *fi. fa.*, nor any contract or understanding with Baker & Hall for any interest in it; but about a month after, he sold Baker & Hall some property, and agreed to and did take from them an assignment of this *fi. fa.* as a part of the purchase price.

The case went to the jury upon this petition and answer, and the evidence of both parties, which it is unnecessary to set out any further than to say that it was conflicting as to the issues made by the petition and answer. The jury found for the complainant as to the Meador Brothers *fi. fa.*, and for the defendant as to the Waitzfelder & Co. *fi. fa.*; and the plaintiff moved for a new trial upon the several grounds therein set out, which was overruled, and she excepted.



The main contention between counsel in their argument here was, as to whether the court erred in refusing to give in charge to the jury the written request of the plaintiff as set out in the 3d ground of the motion for a new trial, which is as follows: "If you find from the evidence that plaintiff, through her husband acting as her agent and by her authority, employed the defendant, Baker, as her attorney to represent her in negotiating with A. P. Silva for the purchase by her of said Silva's interest in the Meador Brothers *fi. fa.*, and that Baker undertook and agreed to represent her, and that neither plaintiff nor her said husband had any notice of said Baker's employment by said Silva to collect said *fi. fa.* (if you find that he was so employed by Silva), and that plaintiff, in seeking to purchase said Silva's interest in said *fi. fa.*, was doing so in order to carry out a general scheme or plan to buy up or compromise all outstanding *fi. fas.* against her, and that she had at the time of her employment of defendant, Baker, through her husband, already arranged with her other judgment creditors, including R. W. Murphey, the attorney of Waitzfelder & Co., for the purchase of such other *fi. fas.*, including said Waitzfelder & Co. *fi. fa.*, at less than their face value, and that plaintiff's husband, at the time he so employed said Baker, unfolded to him plaintiff's entire scheme aforesaid, and informed him of the arrangement already made with other creditors or their attorneys for purchasing their *fi. fas.*, including said Waitzfelder & Co. *fi. fa.*, and that plaintiff, by her said husband, so employed defendant to assist her in negotiating the purchase from said Silva of his interest in the Meador Brothers *fi. fa.*, in order to further and carry out her general scheme of settling or compromising all outstanding *fi. fas.* against her, and that defendant, Baker, knew of this purpose and undertook to represent plaintiff, to buy from said Silva his interest

in the Meador Brothers *fi. fa.* in aid and furtherance of plaintiff's general scheme aforesaid,—if you find from the evidence that these are facts, then I charge you that defendant, Baker, by such employment came into such fiduciary relation to plaintiff as her attorney that he could not, without plaintiff's knowledge or consent, become the purchaser for himself or others (than plaintiff) of either said Silva's interest in said Meador Brothers *fi. fa.* or of the Waitzfelder & Co. *fi. fa.*, and if you find from the evidence that defendant, Baker, while sustaining the relation aforesaid to plaintiff, purchased for himself from Silva the latter's interest in the Meador Brothers *fi. fa.* at less than its face value, and from Murphey, for Baker & Hall, the Waitzfelder & Co. *fi. fa.* at less than its face value, and that he then, for himself, bought from Baker & Hall said last named *fi. fa.* at less than its face value, plaintiff, on payment to defendant, Baker, of the amount paid out by him for the purchase of said *fi. fas.* with interest on such amounts from the time he so expended the same, would be entitled to have said *fi. fas.* transferred and delivered to her."

Under the pleadings and the facts of this case, we think the court should have given this request in charge to the jury. If Larey, as agent for his wife, consulted Baker as an attorney, and employed him to purchase Silva's interest in the Meador Brothers *fi. fa.*, and in this employment disclosed his whole scheme of compromise to Baker, informing him of his purpose to purchase the Waitzfelder & Co. *fi. fa.*, and the price which Murphey, the attorney, had agreed to take therefor, and of his general purpose to compromise all of his wife's debts, then in our opinion Baker, as his agent or attorney, could not take advantage of the information which he had derived from Larey and purchase the Silva interest in the Meador Brothers *fi. fa.* for himself, and could not rightfully purchase the

Waitzfelder *fi. fa.* for Baker & Hall, although Larey had not employed him to purchase the Waitzfelder & Co. *fi. fa.* If he subsequently purchased it from Baker & Hall, the trust would attach to it in his hands, even if Baker & Hall would have been protected had they not assigned to him.

It was ruled by the House of Lords, in *Carter v. Palmer*, 8 Clark & Finnelly's Reports, 657, that "the employment of counsel as confidential adviser disables him from purchasing for his own benefit charges on his client's estates, without his permission: and although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate. C., a barrister, who had been for several years confidential and advising counsel to P., and had, by reason of that relation, acquired an intimate knowledge of his property and liabilities, and was particularly consulted as to a compromise of securities given by P. for a debt which C. considered not to be recoverable to the full amount, purchased these securities for less than their nominal amount, without notice to P., after ceasing to be his counsel. *Held*, that C's purchase, while the compromise proposed by P. was feasible, was in trust for P.; and that C. was entitled only to the sum he had paid, with interest according to the course of the court." In the case of *Hobday v. Peters*, 28 Beav. 349, it was held that where a mortgagor consulted a solicitor who turned her over to his clerk to assist her gratuitously, and the clerk, by reason of information derived during such employment, bought the mortgage for less than half the amount thereof, he was a trustee for the benefit of the mortgagor. In the *Am. & Eng. Ency. of Law* this rule is laid down: "Whenever one person is placed in such relation to another by the act or consent of that other, or the act of a third person, or of the law, that he becomes

interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated." 1 Am. & Eng. Enc. of L. 375. See also *Holman v. Loynes*, 53 Eng. Chan. Rep. 270; 1 Story Eq. §§310-11 and notes, 13 ed.; notes to *Fox v. Macreth*, White & Tud. L. C. in Eq. 228; *Perry on Trusts*, §203 *et seq.*

When we first read the above request, we thought the court did right in not giving it in charge to the jury, because it omitted to charge that Baker would have been entitled to reasonable compensation for purchasing the *fi. fas.*; but upon further consideration of the law and the facts of the case, we reached the conclusion that the omission was proper. We think the law is that where an agent or attorney is unfaithful to his trust, or violates his instructions, he is not entitled to any compensation. In 1 Am. & Eng. Enc. of Law, 397, the rule is laid down as follows: "Where an agent is unfaithful to his trust and abuses the confidence reposed in him by his principal, or where he misconducts himself in the business of his agency, he may be deprived of commission and compensation. Also where he engages in transactions by which he acquires interests or employment adverse to the interests of his principal."

The court erred in not granting a new trial.

*Judgment reversed.*

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McCAULLA v. MURPHY *et al.*

1. Where the plaintiff claims one specific form of relief, and the defendant demurs on the ground that that is not the proper relief under the facts of the case, and the plaintiff thereupon acquiesces in the defendant's view as to the remedy and the law and amends his petition and prays for the relief pointed out by the demurrer, and a trial is had, the jury finding that the relief sought in the amended prayer be granted, and this verdict is set aside and a new

86	475
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trial granted, the defendant cannot then demur to the amendment which he caused to be made by his first demurrer. By demurring to the relief first prayed for and pointing out the proper relief and assenting thereto, he virtually compelled the plaintiff to elect to try the case on the amendment, and therefore ought not to complain because no formal election was made by the plaintiff, or because the court charged the jury upon the relief prayed for in the amendment and omitted to charge upon the relief prayed for in the original petition. Nor should the demurrer be sustained on the ground that the amendment had never been formally allowed by the court. When the amendment was made and acted upon by the court and the parties, that was sufficient.

2. The issue being what the mill in question was worth for hire or rent, the plaintiffs were entitled to prove how much it earned while leased by the defendant to another, not as concluding the question but as illustration.
3. Counsel for plaintiffs having admitted in open court that a certain written contract between the parties was not introduced as a binding contract upon the defendant, it was unnecessary for the court to construe it; and if the defendant then wished to have it construed, he should have requested the court to charge upon it.
4. Refusal to allow one of the plaintiffs to answer a question of law asked him by defendant's counsel, was not error.
5. If the plaintiffs, while legally in possession of the property, were deprived of it by the defendant, they would be entitled to recover rents for its use while thus unlawfully in his possession.
6. The evidence sustains the finding of the jury, the trial judge being satisfied.

December 23, 1890.

Demurrer. Practice. Evidence. Charge of court. Damages. Verdict. Before Judge MILNER. Whitfield superior court. April term, 1890.

Reported in the decision.

W. K. MOORE and McCUTCHEN & SHUMATE, for plaintiff in error.

R. J. & J. McCAMY, *contra*.

SIMMONS, Justice.

Murphy *et al.* sued McCaulla for damages upon the ground that McCaulla had levied upon a certain engine and saw-mill in their possession and had the same sold under said levy, and at the time of the sale he fraudu-

lently prevented one Edwards from bidding by certain false and fraudulent statements made to said Edwards, whereby McCaulla was enabled to purchase the property at the sale at much less than its value. The original prayer in the petition was that McCaulla be compelled to account to them for the value of the machinery; that the executions might be decreed satisfied, and that McCaulla be decreed to pay to them such amount as the property was worth on the day of sale, beyond what was then due on the debt. McCaulla demurred to this petition on the ground that plaintiffs were not entitled to the relief prayed, and if the sale was void, plaintiffs were not entitled to recover any money verdict against him, but could have the sale declared void and allow plaintiffs to resell. Murphy seems to have taken this view of the case, and after the demurrer was filed, he amended his petition and prayed that the pretended sale be set aside and McCaulla be required to account for the reasonable hire of the machinery, praying further for general relief, etc. It does not appear that the demurrer was passed upon at that term of the court, and as far as we can learn from the record, the parties went to trial upon the original and amended petition, and the jury at that term decreed a rescission of the sale and \$600.00 for hire. It further appears that on motion of the defendant this verdict was set aside and a new trial granted. At the next term of the court defendant withdrew his first demurrer and put in a second demurrer to the amendment of the original petition praying for rescission, which he had caused to be made by his first demurrer, claiming that plaintiffs having made their election to affirm the sale and sue for the alleged fraud, such election was conclusive upon them, and the prayer last mentioned was improper and inconsistent with the suit as originally brought. This demurrer was overruled by the court. The case then

proceeded to trial, and the plaintiffs had a verdict. Another motion was made for a new trial, which was overruled, and defendant excepted.

The first special ground of the motion for a new trial claims that the court erred in refusing to strike plaintiffs' amended prayer for a rescission of the sale and claim of rents and overruling defendant's demurrer thereto, and in refusing to submit the question to the jury as to what would be the proper relief in this case under the original prayer or amended prayer, and in charging the jury that if they found in favor of plaintiffs, then they should set aside the sale and find for the plaintiffs reasonable rents for the use of the mill. Under the facts of this case, we do not think the court erred in refusing a new trial upon either of the points made in this ground. We cannot hold as matter of law that where a plaintiff files his suit claiming one specific form of relief, and defendant demurs to ~~that~~ relief on the ground that it is not the proper relief under the facts in the case, and plaintiff then acquiesces in the defendant's view as to the remedy and the law and amends his petition and prays for the relief pointed out by defendant in his demurrer, and a trial is had thereon, the jury returning a verdict granting the relief sought in the amended prayer, and for some reason a new trial is granted and that verdict set aside, the defendant can at that late day demur to the amendment which he caused to be made by his first demurrer. It seems to us that such a proceeding would be trifling with the court. If he was entitled to demur at all to the amendment which he caused to be made by his first demurrer, he ought to have demurred when the amendment was made and not have waited until a trial had been had thereon and a verdict rendered upon the same. Our code declares that demurrers shall be filed at the first term. Nor are we sure that if the demurrer had been

made in time, it ought to have been sustained on the ground taken therein. Under our code and the acts of 1885 and 1887, both legal and equitable causes of action can be joined in the same petition; and if so joined, both legal and equitable rights may be prayed for therein, and the court and jury may enforce either, as the justice of the case may require. If a defendant desires an election to be made by the plaintiff, he should move the court at a proper time to require the plaintiff to elect which remedy he will ask the court and jury to enforce. If the defendant does not do this, and the plaintiff himself fails to elect, in our opinion the court, after hearing the pleadings and the evidence, may then elect for the plaintiff and charge the jury upon such election; or he may charge the jury upon both remedies prayed for in the petition, if he sees proper to do so, leaving it to the jury to say which of the remedies they will give to the plaintiff. Moreover, under the peculiar facts in this case, we do not think the court erred in overruling the second demurrer, because the defendant in his first demurrer pointed out specifically to the plaintiffs the amendment which the plaintiffs made; and by demurring to the relief sought in the original petition and pointing out in his demurrer the proper relief which the plaintiffs ought to have prayed for, he virtually assented to the amendment. By demurring to the first relief prayed, and pointing out the proper relief and assenting thereto, he virtually compelled the plaintiffs to elect to try the case upon the amendment, which was for a rescission of the contract and rents for the mill. He ought not, therefore, complain because there was no formal election made by the plaintiff, or because the court charged the jury upon the relief prayed for in the amendment and omitted to charge upon the relief prayed in the original petition. Nor should the demurrer have been sustained upon the



ground that the amendment had never been formally allowed by the court. When the amendment was made and acted upon by the court and the parties, that was sufficient.

The next complaint is that the court erred in allowing the plaintiffs to prove how much the mill earned while leased by McCaulla to Williams, the objection being on the ground that the inquiry should be restricted to what the mill was worth for hire or rent. What the mill was worth for hire or rent was the real issue to be decided by the jury. They were to decide that question from all the evidence submitted to them—the condition of the mill, its capacity to saw timber, the value of the timber sawed and the proportion of that value to which the mill was entitled, as shown by the opinion of experts on this subject. And as a further illustration as to the value of the mill for rent or hire, we think the plaintiffs were entitled to prove what Williams agreed to pay to defendant for the hire of the mill. Of course, this was not conclusive as to its true rental value, but the jury could take this into consideration in connection with the other facts proved. If there were any special reasons why Williams paid to the defendant more than the mill was worth for hire or rent, then the defendant would be authorized to prove to the jury what those reasons were, as he did in this case, to wit: that Williams gave more for the hire of the mill than its true rental value because the defendant agreed to solicit orders for the mill, etc. When that was proved, doubtless the jury saw at once that what Williams agreed to pay was more than the mill was really worth for hire or rent. So we think there was no error in admitting this testimony.

Nor was there any error in the conduct of the court as complained of in the 7th ground of the motion. The court was proceeding to charge the legal effect of a cer-

tain written contract made between the parties, when plaintiffs' counsel interrupted and remarked that they did not insist upon this contract as a binding agreement, but only as showing the motive of McCaulla. The court then omitted to instruct the jury as to the meaning of the contract or its effect, and said it was before them only to throw light upon the motive which governed the defendant. Plaintiff in error insists that the court erred in omitting to state to the jury the purpose of the agreement and its legal binding effect, and should have stated that if the jury found it was conditional, and the condition was not complied with, then it would not bind McCaulla either legally or morally. The error complained of in this ground is not as to what the court did say, but what he omitted to say. If the objection had been that the court charged the jury that the agreement was before them only to show the motive of McCaulla, it would have presented a different question; but after counsel for the plaintiffs admitted in open court that the agreement was not introduced as a binding contract upon McCaulla, it was then unnecessary for the court to construe the contract, and if the defendant had wished to have it construed after the remarks by plaintiffs' counsel and the court, he should have requested the court to so charge upon it.

There was no error in refusing to allow Murphy, one of the plaintiffs, to answer the question propounded to him by defendant's counsel, as complained of in the 9th ground of the motion. The question propounded was a question of law, and if the witness had answered it, it would not have been as to the fact, but simply his conclusion as to the law upon the facts stated in the question.

The next ground complains that the court erred in charging that the plaintiffs could recover rents in this case against the legal title. We think that if the

plaintiffs, while legally in possession of this property, had been illegally deprived of the property by McCaulla, they would be entitled to rents for the use of the same while thus unlawfully in McCaulla's possession. Under the facts in this case, they had a right to the possession of this property until McCaulla proceeded in a legal manner to dispossess them of the same; and if McCaulla deprived the plaintiffs of the property by fraudulent means, we think their right of possession gave them the right to recover rents for it until they were legally deprived of the same.

The other grounds of the motion not herein discussed complain that the verdict is contrary to law, to the evidence, and is excessive. The evidence was conflicting upon the question of McCaulla's actions at the time of the sale, and as to the value of the mill for rent while it was in his possession. The jury having found for the plaintiffs upon both of these issues, and there being evidence to sustain their finding, and the trial judge being satisfied therewith, we will not interfere with his discretion in refusing a new trial upon these grounds.

*Judgment affirmed.*

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WADE v. WISENANT.

1. Where an affidavit of illegality was filed to an execution issuing from a justice's court, and when the case was called in that court the affiant failed to appear, the magistrate should have dismissed the illegality instead of trying the same *ex parte*.
2. Where two persons were sued in a justice's court, one of whom resided out of the county in which the suit was brought, the return of the constable that he had served this one with a copy of the summons, and that he waived jurisdiction, did not give the magistrate jurisdiction to enter judgment against him. Nor did the fact that he said to the constable that it was all right and he waived jurisdiction, give the magistrate jurisdiction over him.

December 23, 1890.

Justices' courts. Jurisdiction. Practice. Illegality.

Before Judge MILNER. Murray superior court. August term, 1890.

An execution in favor of Wisenant against James Stewart and J. C. Wade, which issued from a magistrate's court of the 824th district G. M. of Murray county, was levied upon the property of Wade. He interposed an affidavit of illegality on the following grounds: (1) He was never served with a copy of the summons, or other notice of pendency of the suit, and never by himself or any agent or attorney waived such service or notice, nor did he appear or plead to the suit. (2) When the suit was begun he was a resident of Whitfield county, and Stewart did not reside in Murray county, and so the court did not have jurisdiction to try the case, and there was no valid judgment against him.

The illegality came on in the magistrate's court, in its regular order, and plaintiff in *fi. fa.* announced ready. There was no appearance, either in person or by attorney, for the defendant Wade. The court proceeded to trial, and plaintiff introduced the original summons to Stewart and Wade, directing them to appear at the December term, 1886, of the court, the third Monday in December, and dated November 6, 1886. This summons had upon it an entry of service of a copy of the original upon the defendant Wade, "he waiving jurisdiction on the same," dated November 13, 1886, and signed by one Kenner, constable; also an entry of service on Stewart. Plaintiff also put in evidence the *fi. fa.* issued from the judgment, with an entry of the levy thereon, and the justice's court docket on which the judgment was entered, and a copy of the entries of the constable as to service. Plaintiff also introduced the constable, who testified that he served Stewart and Wade with copies of the original summons, and that Stewart lived at the time in the district

in which the suit was brought, and Wade lived in Whitfield county; that when he handed Wade the summons he told Wade that he had a summons for him, telling him of the case, and Wade said that it was all right and he would waive all question as to jurisdiction. The court then rendered judgment overruling the illegality. To this judgment Wade excepted by *certiorari*, alleging that the case ought not to have been tried, but that the court should either have continued it or dismissed the affidavit of illegality. Upon hearing the *certiorari* in the superior court it was dismissed, and to this ruling Wade excepted.

MADDOX & LONGLEY, by brief, for plaintiff in error.

TRAMMELL STARR and R. J. McCAMY, *contra*.

SIMMONS, Justice.

The facts in this case will be found in the official report. Under those facts the trial judge erred in dismissing the *certiorari*. The evidence shows that at the time the suit was brought in the justice's court, Wade resided in Whitfield county, and not in Murray county where the suit was brought. His affidavit of illegality set up that he was never served with said suit nor did he appear and plead thereto. When the illegality was called for trial in the justice's court and Wade failed to appear, the magistrate should have dismissed his illegality instead of trying the same *ex parte*. The evidence disclosed on the *ex parte* trial showed that Wade was never legally summoned to appear in the original suit. The constable's return that he had served Wade with a copy of the summons and that Wade waived jurisdiction, did not give the magistrate jurisdiction to enter up a judgment against Wade. Nor did the fact that Wade said to the constable that it was all right and he waived jurisdiction, give the magistrate jurisdiction over him, he not residing in the district or county where the justice's court was held. Nor was that part

of the constable's return as to what Wade said as to waiving jurisdiction, sufficient to bind him. The magistrate having tried the case in Wade's absence, and this being the only evidence before him as to jurisdiction, he erred in overruling the illegality and in ordering the execution to proceed, and the trial judge should have sustained the *certiorari*. *Judgment reversed.*

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LYONS *et al.* v. THE PLANTERS' LOAN & SAVINGS BANK.

1. Demurring generally to the plaintiff's petition is pleading to the merits. After appearance at the first term and demurring generally at a subsequent term, it is too late to raise the question of service by motion or otherwise.
2. The omission of a prayer for process is amendable, and is waived by appearance and pleading.
3. The original petition contained enough to amend by, and the amendment allowed was proper.
4. The petition as amended embraced a cause of action. A promissory note given by the trustees and officers of a church and a suit thereon prosecuted to judgment against the makers, will not necessarily extinguish a debt of the church for which it was given. The question of fact whether it was given in payment or as collateral only, remained open.
5. A church site and edifice may be sold to pay the salary of the pastor. In contemplation of law, justice is not only a cardinal, but the pontifical virtue.
6. It is doubtful whether the 4th equity rule, touching exhibits to pleadings, is applicable in its full force since the act of 1887 establishing uniformity in pleading. Whether so or not, the right result of a case on its merits will not be disturbed because the record of a judgment referred to in the petition was not copied and annexed as an exhibit.
7. Where the material fact in controversy is only the existence of the debt, the judge may decree the appropriate equitable relief under the allegations of the pleadings and the admissions of the answer, upon a verdict of the jury finding in favor of the plaintiff so much for principal and so much for interest. The decree rendered in this case, that the church property be sold by the sheriff, the proceeds applied to the debt and the surplus, if any, turned over to the trustees, was proper.

December 31, 1890.

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87	159
86	486
94	788
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106	220
106	453
106	612
86	486
1108	170
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123	114
86	485
129	103

Demurrer. Practice. Service. Process. Waiver. Amendment. Equity. Pleadings. Churches. Before Judge RONEY. Richmond superior court. April term, 1890.

Reported in the decision.

TWIGGS & VERDERY, for plaintiffs in error.

CHARLES Z. MCCORD and LEONARD PHINIZY, *contra*.

BLECKLEY, Chief Justice.

1. The first thing is the question of service. If the defendants below were not before the court in a way to bind them, and if they presented that objection in due time and manner, what was done as the outcome of the proceedings would have no final result. The complaint as to service was that, although there was a *subpœna* annexed to the original bill, there was no copy of that *subpœna* served on the defendants, copies of the bill only being served. The case was returnable to the October term, 1888. At the appearance term the names of counsel for the defendants as appearing in their behalf, were entered on the bench-docket. On April 12th, 1890, the defendants demurred to the petition, "because said petition and the matters therein contained in manner and form as therein stated and set forth, are not sufficient to constitute a cause of action," and on several special grounds, one of which was "because there is no copy process annexed to any of the copy petitions served upon defendants." The special demurrer was not sworn to so as to entitle it to stand or be treated as a dilatory plea, in which character it would have to be sworn to. Code, §3456. Of course such an averment as a ground of special demurrer was no more than blank paper, for no such defect as want of process annexed to the copy petitions served on defendants, appeared upon the face of the petition or elsewhere in the record. To demur generally to a petition as presenting no cause

of action is to plead to the merits of the case. Here, then, was appearance and pleading to the merits, which under the code was a waiver of service, a waiver which would have been effective had there been no process even to the original petition nor any service whatever. Code, §3335. After this it was too late to raise the question of service, whether by motion or by plea, for why should the defendants invoke the judgment of the court on the cause of action by demurrer, unless they were to be bound by that judgment when rendered? The demurrer was overruled on the first day of the April term, which was the 21st of April, 1890, "upon petitioner's properly verifying the petition and amendments." This condition was complied with on the 29th of April, and not until the previous day was any separate motion made to dismiss because no copy process was attached to the copy petitions served upon the defendants. An additional ground of the motion then made was because the sheriff failed to serve the defendants personally with a copy of the petition. This motion was too late as coming after pleading by general demurrer to the whole action. It follows that there was no error in treating the defendants, in all the subsequent proceedings, as properly in court.

2. We think this was true, although there was no prayer for process either in the original or amended petition, since all such defects are now amendable (Code, §3479). And inasmuch as amendment may be made at any stage, even after verdict, amendable defects are waived by appearance and pleading.

3. The next question is as to the allowance of an amendment to the plaintiff's petition, the amendment being objected to as introducing a new cause of action, and for the further reason that the original petition contained nothing to amend by. Without going fully into the contents of either, we may state in



general terms that the original petition, although very meagre, set up a claim to have the church property in question applied to the payment of a debt which the church owed to a former pastor for services as a clergyman. It is alleged that this debt was evidenced by a promissory note executed by the trustees and officers of the church in pursuance of a resolution passed by the church, which note had been indorsed by the payee, and that suit in favor of the plaintiff was then pending upon the note in the city court of Augusta. An injunction was prayed for, the object of which was to prevent any disposition of the church property before the result of that suit should be reached, and to hold the title of the property *in statu quo* until the further order of the court, the legal title being in the Perkins Manufacturing Company and the equitable ownership in the church. The amendment amplified the statement as to the debt, alleged it to be the debt of the church, averred that the suit on the note had been litigated, had resulted in a judgment in favor of the plaintiff, that the defendants in that suit were personally insolvent and that the *fi. fa.* founded on the judgment had been returned *nulla bona*. It prayed that the church property be subjected to the debt as the debt of the church, and called for equitable intervention because the legal title was not vested in the church nor in the defendants in the common law judgment. It treated that judgment as against the officers and trustees of the church in their personal and individual character and not in their character of trustees and officers, the theory of the plaintiff evidently being that the note was not given in satisfaction or extinguishment of the debt which the church owed to its pastor, but only as collateral security for the same. The original petition had subserved its immediate purpose when the amendment was offered. It had kept the title to the church property *in statu quo* until the

common law suit had proved fruitless. But it had a further object which was to render that property available for payment of the debt in case payment should not be realized out of the collateral note and the suit predicated thereon. The petition was, therefore, a foundation on which to build by amendment, in case further equitable proceedings should become necessary, and this contingency was realized when the makers of the note, at the end of legal process against them, proved insolvent. The matter of the amendment was thus proper material for a supplemental bill, and by our code, §4181, could be brought in by way of amendment. We hold, therefore, that the court did not err in allowing the amendment.

4. The amendment which we have discussed was filed on the 18th of April, 1889, nearly one year before the demurrer was interposed. Did the petition as amended present a cause of action? The parties before the court were the Bank (the indorsee of the note given by the officers and trustees of the church), as plaintiff, and the church, represented by the trustees, the Perkins Manufacturing Company, together with the indorser, the original payee of the note, as defendants. Thus all the parties interested in the original contract between the church and its pastor, and in the ownership of the note which grew out of that contract, were represented. If that note was given and taken not in extinguishment of the church debt, but merely as collateral, neither the note itself nor the suit and judgment thereon in the city court would operate as a discharge of the debt. *Wylly v. Collins*, 9 Ga. 224. The petition treats the debt as still subsisting, and as one to be paid by the church, now that the collateral security has been prosecuted to a return of *nulla bona*. This security is both legally and equitably the property of the bank, the bank having purchased it for value.

Such being the case, the bank has the equitable ownership of the debt owing by the church, the collection of which out of the church property is the ultimate object of this action. The question of fact whether the note was given in discharge of that debt or only as collateral security for it, would be for determination by a jury, and that question, we may assume, was properly submitted to the jury on the trial which finally took place.

5. Treating the debt as unpaid, can the church edifice and the premises on which it stands, the same being a city lot in the city of Augusta, be subjected by a court of equity, or rather by a court of law exercising equitable powers, to its payment? The church as an organization is the Antioch Baptist Church, and the equitable ownership of the property is in it or in the trustees which represent it in this action. The formal legal title is outstanding in the Perkins Manufacturing Company, which once had claims upon the premises as security for a debt now satisfied. Here then is a debtor having some property, perhaps sufficient property, to discharge the debt. Why should it not be so applied? If any debt ought to be paid, it is one contracted for the health of souls—for pious ministrations and holy services. If any class of debtors ought to pay as matter of moral as well as legal duty, the good people of a christian church are that class. No church can have any higher obligation resting upon it than that of being just. The study of justice for more than forty years has impressed me with the supreme importance of this grand and noble virtue. Some of the virtues are in the nature of moral luxuries, but this is an absolute necessary of social life. It is the hog and hominy, the bacon and beans of morality, public and private. It is the exact virtue, being mathematical in its nature. Mercy, pity, charity, gratitude, generosity, magnanimity, etc.,

are the liberal virtues. They flourish partly on voluntary concessions made by the exact virtue, but they have no right to extort from it any unwilling concession. They can only supplicate or persuade. A man cannot give in charity or from pity, hospitality or magnanimity, the smallest part of what is necessary to enable him to satisfy the demands of justice. It is ignoble to indulge any of the liberal virtues by leaving undischarged any of these imperative demands against us. On the credit side of justice we can make any sacrifice of it that we will, but on the debit side we can make none whatever. I may burn as an offering my own bull or lamb, but not that which rightfully belongs to another owner. There is nothing more exalted than a strict duty and its performance. What we freely give cannot be better bestowed than what we pay in discharge of a perfect obligation. The law grants exemptions of property to families, but none to private corporations or collective bodies, lay or ecclesiastical. These must pay their debts if they can. All their property legal and equitable is subject. *Atlanta v. Grant*, 57 Ga. 346. We think a court may well constrain this church to do justice. In contemplation of law, justice is not only one of the cardinal virtues, it is the pontifical virtue. Certainly it is an energetic measure to sell the church to pay the preacher, nor would it be allowable to do so, if other means of satisfying the debt were within reach. But the plain implication from the facts alleged is that the church has no assets other than this property, and on looking into the answer, we find that the answer makes no suggestion of any other assets.

6. Touching that ground of the demurrer which points out specially that the plaintiff has failed to annex to the petition a copy of the record upon which the common law judgment therein referred to is founded, we need say but little. It is doubtful whether, since

the act of 1887 for uniformity of pleading in the superior court, the strict equity rule for attaching exhibits any longer applies. As to how that rule while in force was applied, see *Demere v. Scranton*, 8 Ga. 43; *Holliday v. Riordan*, 12 Ga. 417; *Groce v. Field*, 13 Ga. 24; *Brown v. Redwyne*, 16 Ga. 67; *Miller v. Saunders*, 18 Ga. 492; *Behn v. Young*, 21 Ga. 207; *Howard Mfg. Co. v. Water-Lot Co.*, 39 Ga. 574, s. c. 53 Ga. 689; *Patterson v. Turner*, 62 Ga. 674; *Graham v. Dahlonga, etc. Co.*, 71 Ga. 296; *Millbank v. Penniman*, 73 Ga. 136. It may be observed that the fourth equity rule as it stands in the code, p. 1354, seems to omit the word "other" in the second line, as will appear from a copy of the seventeenth equity rule in 2 *Kelly*, 484. It may be that under the new act, there ought to be some degree of conformity to the rule in pleading all material records and documents referred to in the petition. But where a case has had a right result in the court below on the merits, we do not feel called upon to reverse the judgment simply because that court may have been too liberal to one of the parties, in dispensing with the formality of annexing exhibits to the pleadings. There is no probability that the defendants were unacquainted with the contents of the record in the common law case, or that they suffered any substantial injury or disadvantage in the omission to set it out as an exhibit.

7. The verdict of the jury was as follows: "We the jury find verdict for plaintiff, principal \$278.75, interest \$97.60." On this verdict the court entered up a decree to the effect that the debt is that of the Antioch Baptist Church; that the property is subject thereto; that the debt be a lien upon it; that the sheriff levy upon it under and by virtue of the decree, expose it to sale according to law and execute title to the purchaser; that out of the proceeds of sale the debt and all costs be discharged, and that the overplus, if any, be paid.

over to the trustees of the church; also that the defendants be perpetually restrained and enjoined from disturbing or in any way interfering with the title or said property or the sale thereof, until the debt and costs be paid off and discharged. This decree is excepted to as going beyond the verdict, and as being unwarranted thereby in the light of the pleadings. On looking into the answer, we find that it raised but one material issue, the other material facts being expressly or by fair implication admitted. The answer insisted that the note on which the judgment at law was recovered, was given and received in full satisfaction and extinguishment of the debt due from the church to the pastor for his services, and that the note was executed by the makers as individuals and not as officers of the church; also that they were sued as individuals and judgment recovered against them accordingly. The jury having found in favor of the plaintiff, they must necessarily have determined that the note was not given in extinguishment of the debt. This was enough to warrant the court in decreeing appropriate relief adapted to the allegations of the petition and the admissions of the answer. We fail to perceive that the relief awarded was inappropriate or otherwise illegal. The decree devotes the property to the payment of the debt by judicial sale through the sheriff, and directs the surplus proceeds, if any, to be paid over to the trustees of the church. We think the decree as a whole was a proper one. *Judgment affirmed.*

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LOGAN v. THE WESTERN AND ATLANTIC RAILROAD CO.

The return term fixed by law for all ordinary bills of exceptions is the first term of this court which begins after the expiration of thirty days from the filing of such bills of exceptions in the clerk's office of the court below. Consequently, a bill of exceptions filed on the 10th of September is returnable to the second term of this court thereafter, the first term having commenced on

86	498
119	352
86	493
128	673

October 6th. This is so notwithstanding the transcript of the record and the bill of exceptions reached this court more than twenty days before the commencement of the first term.

December 31, 1890.

Practice. Motion by the defendant to transfer the case to the next term.

Reported in the decision.

O. N. STARR and R. J. McCAMY, for the motion.

J. M. NEEL and T. C. MILNER, *contra*.

BLECKLEY, Chief Justice.

The present October term of this court, as fixed by law, commenced on Monday, the 6th of October. The bill of exceptions in this case was signed and certified on the 10th of September. On the same day service was acknowledged and the bill of exceptions was filed in the clerk's office of the superior court. The transcript of the record was certified on the following day, and on the 13th of September the transcript and bill of exceptions were filed in the clerk's office of this court. The return day of the term, being twenty days before the 6th of October, was September 16th. Thus it will appear that the case reached here in full time to be entered on the docket of this term, and it was to this term that the judge's certificate to the bill of exceptions on its face made the case returnable. But the statute (Code, §4262) declares that "in ten days from the date of such filing, it shall be the duty of the clerk to make out a copy of such bill, together with a complete transcript of the record in such cause." This evidently allows the clerk of the superior court in all cases ten days after the bill of exceptions is filed in his office to make out a transcript of the record. Hence it follows that where the date of filing is less than ten days before the return day of this court, the case is properly returnable by law, not to the first, but to the second term after such filing. This is the construction

which has heretofore been given to the statute. *Central Railroad Co. v. Ferguson*, 63 Ga. 88; *Searcy v. Tillman*, 75 Ga. 505. And see *Chapman v. Stiles*, 6 Ga. 113. Any other construction would put it in the power of the clerk of the superior court to fix the return term of many cases by using more or less dispatch in making out the transcript and forwarding it and the bill of exceptions to this court. There would thus be no absolute uniformity in the matter. We think the plain and simple rule which the statute contemplates, as the law now stands, is that all ordinary bills of exceptions filed in the court below are returnable to the first term of this court which begins after the expiration of thirty days from such filing. When they have been so filed and reach the clerk's office of this court twenty days before the beginning of the term, they are to be entered in making up the docket in the first instance under section 4265 of the code. If they are received later and before the court has finished the circuit to which they belong, they are to be entered under section 4272(d) of the code. As the law fixes the term to which each and every bill of exceptions is returnable, a misdescription of the term in the judge's certificate or elsewhere is of no consequence and ought to be simply disregarded. *Miller v. Speight*, 61 Ga. 460; *Gauldin v. Shehee*, 20 Ga. 531. Inasmuch as the bill of exceptions in the present case was filed in the clerk's office below on the 10th of September, which was less than thirty days preceding the commencement of the present term, the law made it returnable to the next term. It was, however, entered upon the docket of this term; and upon the call of the case here for argument, counsel for the defendant in error objected to treating it as returnable to this term and moved that it be transferred to the docket of next term. This motion should be granted, and the clerk will act accordingly.

*Motion granted.*



86 396  
121 333

CLEGHORN, administrator, *v.* SCOTT, executor, *et al.*

1. Under the provisions of the will, a son of the testator who survived him two years was entitled to share in all the dividends from the testator's railroad stock which accrued up to the death of the widow. The death of the son did not terminate his legal title to the dividends which were to accrue thereafter.
2. As to the *corpus* of the stock, the distributees contemplated by the testator were his own children who might be in life at the death of his widow, and the children of those who might then be deceased, the child of any deceased child representing its parent.

January 14, 1891. By two Justices.

Wills. Estates. Title. Construction. Before Judge MADDOX. Chattooga superior court. March term, 1890.

Petition of the executors of James Scott for direction, to which the children and the administrator of Dunlap Scott, son of the testator, were defendants. The testator died in 1872; Dunlap Scott died in 1874, leaving a wife and three children. The testator's widow died in 1889, and thereupon the executors sold the railroad stock referred to in the will, the material items of which are quoted in the opinion. As to one sixth of the fund arising from the sale of the stock and from the dividends, this being the share which under the will goes either to the estate of Dunlap Scott, or to his children in life at the death of the testator's widow, the executors were in doubt, the children claiming that it should go directly to them, and the administrator claiming that it should be paid to him to be administered. The court held that the children by representation took the same share of the dividends as they accrued, and, upon the death of the testator's widow, the same share of the stock or its proceeds, which Dunlap Scott would have taken had he lived; and that his estate was entitled to no share in the stock or its proceeds, nor in any dividends which accrued after his death.

W. M. HENRY, by T. W. ALEXANDER, for plaintiff in error.

REECE & DENNY, C. N. FEATHERSTON, J. F. HILLYER  
and J. D. TAYLOR, *contra*.

BLECKLEY, Chief Justice.

The two questions are, first, what disposition did the testator make of the dividends upon his railroad stock which accrued between the period of his own death and the death of his widow? secondly, what disposition did he make of the *corpus* of the stock?

1. There is no dispute that by the second item of the will the widow took \$250.00 annually during her life out of the profits or income accruing from the railroad stock. What was to be done with the balance? To answer the question the eighth and ninth items of the will are to be read together. The eighth item is as follows:

"My stock in Georgia Railroad and Banking Company I desire shall not be divided until the death of my wife, except the dividends or income arising therefrom, which, after carrying out the provisions specified in the second item of this, my will, I wish to be divided and distributed as hereinafter designated."

Then comes the ninth item, which contains the designation referred to. It is in these words:

"All my other property, real and personal, of every description, I desire shall be sold and distributed share and share alike between my children then living and the child or children then living of any of my children who are dead or who may die before my death, so that the child or children of each of my three deceased children shall take the same that would have gone to their deceased parents had they survived me. At the death of my wife I desire that there shall be a division of all my Georgia Railroad and Banking Company stock on the same principle as last provided."

Nowhere else in the will has the testator provided for any distribution of the general body of his estate or named the persons to whom it is to be distributed. We are safe in concluding that he intended the surplus

income from his railroad stock to go to the same persons who were appointed to receive the proceeds of his general property, and these persons were ascertained when the time arrived for making the first distribution. Testator's son, Dunlap Scott, survived his father two years and so was one of the distributees entitled to participate in the first distribution. This being so, he was certainly entitled to share in the dividends of the railroad stock with the other living children of the testator. His title to an equal share in the dividends having vested, did not become divested by his death before some of the dividends were realized. The will contemplates only two divisions, one to be made at the testator's death or so soon thereafter as practicable, and the other at the death of his widow. Those who were to take at the first division were to take everything he left not otherwise specifically disposed of, except the *corpus* of the railroad stock. It is manifest that the dividends were not to be retained by the executors until the persons entitled to take the *corpus* of the stock were ascertained. There is no hint of such a purpose anywhere in the will.

2. There is some doubt whether the *corpus* of the stock was not intended to go to the same persons who shared in the body of the estate, but it is perhaps the sounder construction to hold, as did the court below, that the words "on the same principle as last provided" indicate that children were to be substituted for parents who might be deceased at the time the stock was to be divided, to wit, at the death of the testator's widow. This construction we are inclined to believe is the true one, and we endorse the adoption of it by the court below. The result is that the judgment is affirmed as to the *corpus* of the stock, but reversed as to the dividends or income.

## THE NORTH &amp; SOUTH STREET RAILROAD CO. v. CRAYTON.

280 499  
Case 1  
115 332

Judgment will not be arrested for uncertainty in the verdict as to amount where the finding of the jury is for a specific sum "less amount of freight" and there is no freight involved in the controversy. The superadded words are meaningless and may be treated as surplusage.

January 14, 1891. By two Justices.

Judgment. Verdict. Practice. Before Judge GOBER.  
Floyd superior court. March term, 1890.

Reported in the decision.

REECE & DENNY and DABNEY & FOUCHÉ, for plaintiff  
in error.

NUNNALLY & NEEL, *contra*.

BLECKLEY, Chief Justice.

The motion in arrest of judgment was properly overruled. The verdict was in these words: "We, the jury, find for plaintiff eight hundred dollars (\$800.00), less amount of freight, with interest; also, setting up lien, and find property subject set forth in declaration." The words "less amount of freight" are surplusage. There was no freight involved in the issue on trial. Nothing of the sort was mentioned anywhere in the pleadings. The verdict is therefore for eight hundred dollars less nothing, and this is equivalent to eight hundred dollars simply. The jury having found no amount by which it is to be diminished, it cannot be diminished at all.

*Judgment affirmed.*

## THE ROME &amp; CARROLLTON CONSTRUCTION CO. v. DEMPSEY.

An employee who is under orders to couple cars with a stick only and is injured while coupling with his hand without a stick, is himself in fault and cannot recover.

January 14, 1891. By two Justices.

Railroads. Negligence. Master and servant. Before Judge GOBER. Floyd superior court. March term, 1890.

Reported in the decision.

DABNEY & FOUCHÉ, W. W. BROOKES and W. T. TURNBULL, for plaintiff in error.

WRIGHT, MEYERHARDT & WRIGHT, by brief, *contra*.

BLECKLEY, Chief Justice.

According to the evidence of Dempsey himself, the speed of the engine in backing was open to his observation and was too high for the coupling to be made with safety. No good reason appears why he did not notice that the engineer failed to slacken the speed, and why he did not observe the fact in time to save himself by getting out of the way. But waiving this question, the evidence is clear and uncontradicted that he had been instructed by the conductor to use a stick in coupling and not to attempt to make a coupling in any other way. He had no stick and fails to explain why he did not have one. At the time he was hurt he was engaged in a breach of orders, and that breach contributed to his injury; for the conductor testifies that, had he used a stick, he would not have been injured. To this testimony of the conductor he offered no contradiction and made no reply. The case is controlled in principle by *Sloan v. Georgia Pacific Rwy. Co.*, 86 Ga. 15, 12 S. E. Rep. 179.

The court erred in not granting a new trial.

*Judgment reversed.*

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#### THE WESTERN UNION TELEGRAPH COMPANY v. HILL.

1. A levy for the enforcement of a decree against specific property which describes the property as the decree describes it, though the description may be loose, is not void for uncertainty.

2. There being no evidence of any contract as to making a demand upon the telegraph company prior to bringing action for damages, it was not error for the court to decline to charge the jury in relation to a demand.
3. The defendant in error will be taxed with the costs of bringing up a second transcript of so much of the record as the plaintiff has brought up, and of so much in addition thereto as is wholly superfluous.

January 14, 1891. By two Justices.

Levy. Charge of court. Demand. Practice. Before Judge MEYERHARDT. City court of Floyd county. June term, 1890.

After the former decision in this case as reported in 85 Ga. 425, a trial was had, and the jury found for the plaintiff \$227.40 with interest and costs. The defendant moved for a new trial, one ground of the motion being that the levy in question was void for uncertainty and want of proper description, the sale was illegal and void, and the purchaser took nothing by his bid and acquired no title; and that, this being so, the plaintiff was not damaged by the sale. The levy was "on the S. W. portion of lot of land No. 213 in 18th district and 3d section of Polk county, Ga., as the property of J. B. Little and I. P. Harris, leased by J. B. Little in February, 1885, from J. H. Davitte for the space of five years with the privilege of keeping twenty years, for the purpose of raising lime-rock and burning lime; also one lime-kiln standing on said land; also that portion of lot No. 219 in 18th district and 3d section of said county, leased by said J. B. Little and I. P. Harris for the purpose of building houses on, and three small tenant houses standing on lot No. 219, as the property of J. B. Little and I. P. Harris; notice given parties in possession as required by law."

BIGBY & BERRY and C. ROWELL, for plaintiff in error.

WRIGHT & HARRIS, *contra*.

BLECKLEY, Chief Justice.

1. The levy was certainly loose in the description of

the property, but it was based upon a decree of the superior court and was as certain as the decree itself. It embraced certain lime-works, and parol evidence as to the situation of these works would be admissible to identify the property. On the whole, we do not think that the description was so uncertain as to render the sale made under the levy void.

2. The refusal of the court to charge the jury on the subject of a demand prior to bringing the action was proper, for the reason that there was no evidence on which to base any charge on the subject. When the case was here before (85 Ga. 425, 11 S. E. R. 874), it appeared that the terms printed on the telegram touching demand had been put in evidence, but on the second trial the telegram appears to have been introduced as written, without these printed terms going to the jury. At all events, there is nothing in the brief of evidence or elsewhere in the record showing that they constituted any part of the evidence submitted on the second trial. They are not mentioned either in the declaration or the plea, and from the transcript of the record now before us we cannot tell what they were, or indeed that there were any terms at all relating to a demand.

3. The transcript of the record which the defendant in error caused to be sent up was wholly superfluous as to most of its contents. There was no point made on the process or the entry of service, and consequently these were not needed. The plaintiff in error had brought up the declaration and the evidence of Wilson, Davitte and Woodruff; consequently a second transcript of these documents was not needed. We shall direct in the judgment that the costs of bringing up these superfluous matters be paid by the defendant in error. The court did not err in denying the motion for a new trial.

*Judgment affirmed.*

## THE WESTERN UNION TELEGRAPH COMPANY v. NUNNALLY.

86	508
92	620
86	508
96	810
86	508
111	592

A suit under the act of 1887 for the recovery of a penalty incurred by a telegraph company by reason of its failure to deliver a dispatch in due time is barred by section 2925 of the code within one year from the time the company's liability thereto was discovered or by reasonable diligence could have been discovered.

January 14, 1891. By two Justices.

Actions. Penalties. Limitations. Before Judge MEYERHARDT. City court of Floyd county. September term, 1890.

Reported in the decision.

BIGBY & BERRY and C. ROWELL, for plaintiff in error.

NUNNALLY & NEEL, by brief, *contra*.

BLECKLEY, Chief Justice.

It appears upon the face of the declaration that the cause of action arose and the plaintiff had knowledge of its existence more than one year before the institution of the suit. The statute of limitations was pleaded, and at the trial the defendant made a motion to dismiss the action because it was barred. This motion ought to have been granted, inasmuch as the plea was supported by facts which appeared on the face of the declaration. Under the code, §3459, the matter of the plea was available by motion, for the truth of it was established by the declaration itself. The action was for a penalty imposed by the act of 1887 upon the telegraph company for failure to deliver a message with due diligence. The act itself denominates the sum recoverable as a penalty, and this court, in *Western Union Telegraph Co. v. Taylor*, 84 Ga. 408, has held it to be a penalty for violating a statute by the breach of a public duty. And see *Goodridge v. Union Pacific Railway Co.*, 35 Fed. Rep. 35.

Section 2925 of the code is in this language: "All



actions by informers to recover any fine, forfeiture or penalty, shall be commenced within one year from the time the defendant's liability thereto was discovered, or by reasonable diligence could have been discovered." The case is clearly within the spirit and meaning, if not within the very letter, of this section. The action is to recover a penalty, and it is brought by one who, if not literally an informer, is designated by statute to take the fruits of an action brought for the violation of a public penal law. The definition of informer given in Bouvier's Law Dictionary is, "A person who informs or procures an action against another whom he suspects of the violation of some penal statute." It will aid us in arriving at the true sense of the code to look back at the legislation which it superseded. The colonial act of 1767, Cobb's Digest, p. 563, contained this provision: "In all and every case where any penalty, fine or forfeiture whatsoever, hath been, or shall hereafter be inflicted or imposed by any act or acts of the General Assembly of this Province already passed, or hereafter to be passed, and the time of suing or prosecuting the offender or offenders against such acts not thereby provided, no information, action, suit or prosecution shall be had, brought, issued or commenced against the offender or offenders, against any such act or acts, for or in respect of any such penalty, fine or forfeiture, unless the same be done within six months after the passing of this act, if the offence hath been already committed, and within the like space of time after the offence committed, for the future; and all and every offender and offenders against any such act or acts, shall not from thenceforth be subject or liable to any penalty, fine or forfeiture which may thereby be inflicted or imposed, any law, usage, or custom to the contrary in any wise notwithstanding."

Then came the act of 1855 (Acts of 1855-6, p. 236),

in these words: "Where any person shall be guilty of acts, which by the laws now in force, subject the offender to any penalty, fine or forfeiture and the time of suing or prosecuting such offender, is not otherwise provided for in this act, no action suit or indictment shall be brought against such offender unless the same be brought within one year next after the offence shall have been committed."

We have no doubt that the code intended to sum up all the cases provided for in these two previous statutes, and treat them as cases brought by informers. If this construction is not sustainable, then the code prescribed no limitation whatever for such an action as the one now under consideration, unless it falls within section 2916 which is in these words: "All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action accrues."

We think it incredible that actions for penalties should have been limited to one year when brought by an informer, and to twenty years when brought by others not falling within the strict, literal description of informers. There is every reason why the omission of a telegraphic company to deliver a message with due promptness should not be left open to suit for twenty years. If any penalty whatever ought to be prosecuted for speedily, it would be one of this nature. To leave the company exposed to suit for the almost innumerable transactions of this kind for twenty years, would be simply absurd. In *Adams v. Woods*, 2 Cranch, 342, Chief Justice Marshall said, speaking of a statute of the United States: "In expounding this law, it deserves some consideration that, if it does not limit actions of debt for penalties, these actions might, in many cases, be brought at any distance of time. This

would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." If all actions by informers for penalties are to be commenced within one year, it is much more reasonable to treat all persons empowered to sue for penalties as informers, than to hold that the right of action remains open for twenty years for a class of penalties which ought to be sued for speedily if any ought.

*Judgment reversed.*

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DAVIS v. TAYLOR *et al.*, executors.

Where the defendant in ejectment had been in possession more than seven years under color of title and claim of right when the action was brought, her insolvency is not cause for her expulsion and the appointment of a receiver to secure the mesne profits pending the suit on a petition in the nature of a bill in equity filed for that purpose by the plaintiffs in ejectment.

January 14, 1891. By two Justices.

Receiver. Ejectment. Title. Insolvency. Before Judge MADDOX. Haralson county. At chambers, November 17, 1890.

Reported in the decision.

ADAMSON & JACKSON, and W. F. BROWN, for plaintiff in error.

McBRIDE & EDWARDS, *contra*.

BLECKLEY, Chief Justice.

At the time the action of ejectment was brought the defendant in that action, Mrs. Davis, had been in possession of the premises under color of title and claim of right for more than seven years. During that time there is no indication in the evidence that she ever acknowledged title in the plaintiffs in ejectment or in any one else. She seems to have held for herself

against the world. We think, under these circumstances, that it was a mistake for the judge by a summary order to turn her out of possession and place the property in the hands of a receiver to await trial and judgment in the action of ejectment. The plaintiffs having acquiesced for more than seven years in the adverse holding, were chargeable with laches, and this ought to count against them in their application for a receiver. Had they brought their action promptly before the attachment of a *prima facie* bar, perhaps they would have been entitled to a receiver pending the action to secure the mesne profits, the defendant being insolvent. But a possession so ancient and long-continued should not be disturbed by an interlocutory order in advance of a trial by jury.

*Judgment reversed.*

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PEARCE v. THE STATE.

Where the plaintiff in error fails to comply or attempt compliance with the act of November 11, 1889, prescribing the manner of bringing cases here, this court has no jurisdiction, and the bill of exceptions must be dismissed.

January 14, 1891. By two Justices.

Practice in Supreme Court. Jurisdiction.

W. F. BROWN, by brief, for plaintiff in error.

A. RICHARDSON, solicitor-general, by brief, *contra*.

SIMMONS, Justice.

The bill of exceptions in this case fails to specify what portions of the record are material to be transmitted to this court, as required by the act of November 11th, 1889 (Acts 1889, p. 114); and the certificate of the judge to the bill of exceptions is not the certificate prescribed by that act. The act declares that no case shall be taken to the Supreme Court by bill of exceptions except in the manner prescribed therein.

As the plaintiff in error has failed to comply with or even to attempt compliance with the provisions of this act, this court has no jurisdiction of the case, and the bill of exceptions must be dismissed.

*Writ of error dismissed.*

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NEWBURGER & BROTHER v. HOYT.

1. Where, under a contract of sale or return, cigars were bought upon four months time, the buyers having until the end of that time to ascertain whether the goods gave satisfaction and whether a trade in them could be built up, and the right to return at the end of that time, at the expense of the sellers, such as were left on hand in the event they did not give satisfaction and a trade in them could not be built up, the buyers had the full four months to ascertain whether they gave satisfaction, and a reasonable time thereafter in which to return them if at the expiration of the four months they were not satisfied with them, and were not compelled to return them on the day the four months expired.
2. Where, at the expiration of the four months, a dispute arose between the buyers and the sellers concerning the contract, the latter contending that the sale was an absolute one and that their agents had no authority to make with the buyers the contract of sale or return, and correspondence and negotiations ensued between the parties and counsel, with a view to a settlement of the claim, the buyers having tendered the remaining cigars to the counsel of the sellers and offered to pay for those sold, a lapse of five weeks between the expiration of the four months and the time of the loss of the cigars by a flood, was not so unreasonable as to throw the loss on the buyers.

January 14, 1891. By two Justices.

Contracts. Sales. Rescission. Vendor and purchaser. Before Judge MADDOX. Floyd superior court. March term, 1890.

Newburger & Brother, of Cincinnati, O., sued Hoyt as surviving partner of Hoyt & Company, of Rome, Ga., upon an account for \$155 for 5,000 cigars, besides interest. The defendant pleaded not indebted. Also, in brief, that the cigars were sold on the express agreement that if they did not give satisfaction, so that defendant could build up a trade in them, he might return

86	508
117	134
117	475
86	508
121	780

what should be left unsold at the expiration of four months and get credit therefor at the price at which they were bought; that they did not give satisfaction to customers, and in consequence defendant could not build up a trade in them, and on February 21, 1886, the expiration of the four months, he notified plaintiffs that the 4,000 cigars remaining unsold were subject to plaintiffs' order; that they neglected to give any order for their disposition, but allowed them to remain in defendant's custody, who took all reasonable and proper care of them, but about the first of April thereafter, while they were in defendant's storehouse in Rome, they were ruined by an unprecedented flood which then visited that city; and that he offered to pay plaintiffs for the cigars sold, at the expiration of the four months, but they refused to accept the same; and he now tenders and pays into court the amount due therefor, with interest to date, to wit, \$35.65.

The evidence for the plaintiffs tended to show the following: The goods were sold in the regular course of business, in the ordinary way, the sale being an absolute one on four months time. There was no agreement whatever as to the return of the unsold balance when the bill for the purchase should become due on February 21, 1886. No tender of any kind, either before or after the bill became due, was made by defendant; he did not make any tender or offer of settlement by proposing to return the unsold goods and paying for those sold, nor has he ever tendered to plaintiffs the unsold goods. They never received any communication to that effect; the only communication they received in regard to the transaction was a printed circular dated January 7, 1886, signed by W. D. Hoyt, informing them, as creditors of W. D. Hoyt & Company, of the sudden death of R. T. Hoyt, the business manager of the house, and stating that this event might prevent

the paper of the house being met as promptly as W. D. Hoyt would like, but he desired to assure plaintiffs that the assets of the house far exceeded its liabilities, that plaintiffs' account would be paid in full, and that he hoped to be able to make arrangements by which all liabilities would soon be paid. No letter was received by plaintiffs from defendant under date of February 19, 1886, and no letter whatever on the subject of tender or return of goods, etc. The plaintiffs' traveling agent who sold the cigars had no authority to make any promises in regard to the privilege of returning any unsold goods; his sole duty was to sell goods direct, without any conditions or restrictions. The account is just, correct, past due and unpaid. On January 20, 1886, plaintiffs sent the claim to Reece & Denny, attorneys at Rome, not for collection, but to protect plaintiffs' interest should they be jeopardized before the account fell due; this was on account of plaintiffs having received the circular letter of January 7, 1886. On March 2, 1886, in pursuance of advice from plaintiffs that they had drawn on defendant and that the draft had not been paid, Reece called upon W. D. Hoyt; and on March 17, 1886, Denny also called upon him, and what transpired between them is hereafter stated. Reece & Denny wrote to plaintiffs with regard to the return of the unsold goods, and plaintiffs denied the contract and said they had never received any letter from defendant with regard to the transaction. Denny thought the matter would have been settled if the cigars had not been destroyed by the freshet, as Reece & Denny were trying to get the consent of plaintiffs to settle according to Hoyt's claim, as an accommodation to Hoyt and at his request, although plaintiffs denied the contract and were unwilling to accept any return. As a result of this effort of Reece & Denny, Hoyt received from plaintiffs the letter hereafter mentioned, after the goods

were destroyed. It would take about twenty-four hours for a letter to go from Rome to Cincinnati.

The testimony for the defendant tended to show the following: Rutherford, traveling salesman of plaintiffs, sold Hoyt the cigars, under a contract made on October 15, 1885, at Hoyt's store, and written on an account-book of Hoyt & Company, stipulating that the cigars were bought at four months time, on condition that if they did not give satisfaction so that Hoyt & Company could build up a trade in them, what was left might be returned at the expense of plaintiffs. Hoyt & Company endeavored to sell the cigars, but they did not give satisfaction and not many were sold. About February 19, 1889, plaintiffs drew on Hoyt & Company for the price of the cigars; and a letter written by Hoyt's direction to plaintiffs (a copy of which was introduced in evidence) stated that the draft had been presented for payment; that the terms under which the cigars were bought were, that if they did not sell and a demand was not created for them, they could be returned at plaintiffs' expense; that Hoyt & Company had sold but few of them, though they had tried to push them; and that they would count what cigars they had on hand and remit for what they had sold. The reason Hoyt did not then ship the cigars back as stipulated in the contract was, that he thought it proper and fair to give plaintiffs an opportunity to direct as to their shipment, or to order what to do with them. Frequently in such cases the jobber may have dealings with other parties in Rome or its vicinity, and can dispose of the goods without the expense of shipping them back. It is the custom among merchants to ask such direction when returning goods. A short time after the letter of February 19th was written, and about the time to get a reply to it, Reece called on Hoyt with the account for collection. Hoyt showed him the contract



under which he had bought the cigars, and told him they had not given satisfaction and Hoyt & Company were ready to return those not sold and would pay for those sold. They had sold about one thousand and had packed the other four thousand in a box to themselves. Reece said he had not heard of this contract, would inform his clients of it and see what they might say about it. Some days after, Denny called about the same matter, was shown the contract and took a copy of it, and Hoyt told him that Hoyt & Company were ready to return the cigars. They had the cigars counted in Denny's presence and offered to turn them over to him, but he said he had no authority to take them and would confer with his clients about the matter. The cigars remained in Hoyt's store until destroyed, the last of March, 1886, by an extraordinary freshet which flooded the stores in that portion of the city and ruined the goods. Hoyt took the same care of these cigars as he did of his own goods, and such as was ample against any high water ever before known in Rome. A few days after the flood he received from plaintiffs a letter directing the cigars to be shipped back to them. This letter was not in response to any from Hoyt. The only effort he had made to return the goods previous to Denny's call was the letter of February 19th, written by his book-keeper, who testified that he could not say he recollected the mailing of this particular letter, but his invariable custom was to mail in the evening all business letters he had written during the day, and, as the letter-book showed the date of this letter to be February 19th, he knew that he mailed it with his other letters of the same date that evening. No answer to this letter was received, though answers were received from other letters written on the same day. Some of the cigars, remnant of a box or two, were sold after this letter was written and after Reece and Denny called.

When the contract as to the cigars was made, Rutherford recommended them very highly and said Hoyt & Company would have no trouble in introducing and selling them. Hoyt & Company exposed them in their show-case and made all efforts to sell them, but they did not give satisfaction, and a purchaser would never buy them a second time. If they had been as represented, Hoyt & Company ought to have sold all of them in the four months, considering the extent of their trade in cigars. Two retail cigar-dealers testified that cigars are frequently sold with satisfaction guaranteed or goods returned, and if they do not prove satisfactory it is the custom of the trade to communicate with the jobber as to what disposition to make of them, before exercising the option to return them. This the witnesses themselves frequently did. Their testimony as to the custom refers generally to the matter and where there is no written contract; but when a written contract is entered into, custom has nothing to do with it; and if, under the contract, goods are to be returned at a specified time if not satisfactory, the letter of the contract is strictly complied with by these witnesses.

The jury found \$35.65 for the plaintiffs, who moved for a new trial. which was denied, and they excepted.

REECE & DENNY, for plaintiffs.

C. N. FEATHERSTON, for defendants.

SIMMONS, Justice.

The facts will be found in the official report. The contract set out therein was one known as a contract of sale or return. In this class of contracts the property and goods vest immediately in the buyer, with an option to return or resell to the original vendor such as may remain on hand at a stated time. It amounts to nothing more than a mere privilege to rescind the sale. Until the option to return is exercised, title remains in the buyer. If no particular time is fixed for the return,

then a reasonable time in which to do so is allowed; but if a particular time is fixed, the return must be made within that time, and the question of reasonable time does not enter. *Benj. Sales, Bennet's notes*, p. 560; 3 *Am. & Eng. Enc. L.* 433. Under this contract, Hoyt & Co. bought the cigars upon four months time, and had until the end of that time to ascertain whether they gave satisfaction and whether they could build up a trade in them; and what was left on hand at the end of four months they had the right to return at the expense of Newburger & Co. in the event they did not give satisfaction and they could not build up a trade in the cigars. They had the full four months time to ascertain this. And if at the expiration of the four months they were not satisfied with the cigars, they had a reasonable time thereafter in which to return them, and were not compelled, in our opinion, to return them on the day the four months expired.

But it was contended by counsel for the plaintiffs in error that if they were not compelled to return them at the expiration of the four months, and were to be allowed a reasonable time thereafter, the time from the expiration of the four months until the cigars were lost by the flood was an unreasonable time, and therefore Hoyt & Co. were liable for the loss. This perhaps would be true were it not for the special facts in this case. The record shows that about the time of the expiration of the four months, a dispute arose between Hoyt & Co. and Newburger & Co. concerning the contract, Newburger & Co. contending that it was a straight out sale to Hoyt & Co., and that their agent had no authority to make with Hoyt & Co. the contract of sale or return evidenced by the writing in this case. The record shows that correspondence and negotiations were going on between the parties and counsel with a view to a settlement of the claim, Hoyt & Co. having tendered the

cigars to the counsel of Newburger & Co. and offered to pay for what cigars they had sold. Under these facts, we agree with the court and jury below that the time between the expiration of the four months and the loss of the cigars was not so unreasonable as to throw the loss upon Hoyt & Co. *Judgment affirmed.*

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SUTHERLAND v. THE STATE.

If the two witnesses for the State are worthy of credit, the evidence is sufficient to authorize the conviction, the trial judge being satisfied.

January 14, 1891. By two Justices.

Murder. Criminal law. Evidence. Verdict. Before Judge GOBER. Floyd superior court. March term, 1890.

Crocket Ellison, Lum Sutherland and Lee Sutherland were indicted as principals in the first degree, for the murder of Charles Moore; and in a second count Ellison was charged as principal in the first degree, and the Sutherlands as principals in the second degree. On the trial of the two Sutherlands the testimony for the State tended to show that about half past ten o'clock at night, Moore went into a house where a dance was going on, followed by Ellison with a double-barrelled shot-gun. They had been fussing outside. Moore took hold of Ellison's gun, and asked Ellison not to shoot him. He had no weapon, and was not trying to hurt Ellison. Lum Sutherland was then in the house, and he too had a shot-gun, but was not seen doing anything with it in the house. Ellison told Moore he was not going to shoot him, and asked him to turn loose the gun, which Moore did. Ellison opened the door and went out, and so did Lum Sutherland, carrying his (Lum's) gun. When outside, according to one witness, Lum put something on Ellison's gun; according to another, Elli-

son snapped his gun pointing in the house, and it would not go off; he asked for a cap, and one of those outside gave him one; witness did not know which one it was, but thought it was one of Lee's brothers, not Lum. The door was closed by those inside, who tried to hold it shut, and Lum tried to shove it open with his gun. Ellison stood at the crack of the door and told them to shove the door again until he could get sight and he would get him, and when they shoved it the last time he got his gun in the crack, took aim, shot and killed Moore, and said, "I got him boys, let's go"; and they all went up the hill.

The testimony for the defendants tended to show that before the killing, Lum had given his gun to a woman when he went into the house, asking her to take care of it until he got ready to go home, and she took it and set it over behind a table. He had his gun because he and Ellison had been bird-hunting that afternoon and went to the party without going home first. There was a good deal of confusion just before the firing, people running out and in. Lum and Lee both were in the house when the shooting took place. When Moore came into the house he called for his pistol. Lum was standing at a table in the house when the firing occurred. One witness testified that the general character of one of the State's witnesses was bad and that he would not believe him on oath. Both defendants, in their statements, denied knowing anything about the fuss or who was in it, and claimed that they were in the house when the shooting occurred.

Lum was found guilty as principal in the second degree, and recommended to imprisonment for life; Lee was found not guilty. Lum moved for a new trial, which was denied, and he excepted.

REECE & DENNY and T. W. ALEXANDER, for plaintiff in error.

W. J. NUNNALLY, solicitor-general, and W. J. NEEL,  
*contra*.

SIMMONS, Justice.

The only ground taken in the motion for a new trial is that the verdict is contrary to law and the evidence. The evidence is conflicting. If the two witnesses sworn for the State are worthy of credit, the evidence is sufficient to authorize the verdict of the jury. The trial judge was satisfied with the finding, and overruled the motion for a new trial; and we will not interfere with his discretion.

*Judgment affirmed.*

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THE CHATTANOOGA, ROME AND COLUMBUS RAILROAD  
COMPANY v. McLENDON.

1. In a suit by an executrix against railroad and construction companies for damages from their having removed a stock gap from their right of way, leaving growing crops of the estate exposed to cattle and other animals, testimony as to cost of fencing the right of way, the amount of fencing necessary and the cost of keeping up the same, was not admissible, she having made no *profert* in her declaration of her letters testamentary, and not having submitted them to the court, and not having submitted a copy of the will to show how long she was entitled to hold the land as executrix, and it not appearing whether the land may not have been devised to a particular child or children.
2. The suit being upon a contract and not for a tort, it was error to charge that if the stock-gap was maliciously removed, that fact might be considered in arriving at what damages the plaintiff ought to recover.

January 14, 1891. By two Justices.

Actions. Damages. Torts. Contracts. Evidence.  
Before Judge MADDOX. Floyd superior court. March  
adjourned term, 1890.

Mrs. McLendon, as executrix of S. D. McLendon, brought her action against the Rome and Carrollton Construction Company and the Chattanooga, Rome and Columbus Railroad Company for \$682.75 damages,

alleging as follows: The estate of her testator consists in part of land in the 4th district and 4th section of Floyd county. About April 25, 1888, defendant or defendants assessed the right of way through the land, which was then in cultivation, having growing upon it a crop for the benefit of the estate; and the land and crops were fully protected up to the time of the assessment. At that time and while the crops were being planted, there was a stock-gap and fence on the land protecting it and the crop, the stock-gap having been built by defendants, as it was their duty to do, to protect the land when they moved the fence to build the railroad through the land. When the jury assessed the damages for the right of way through the land, the assessment was based upon the railway and defendants' maintaining, in proper condition, the stock-gap or other means for protecting the land and crops from animals, which fact was known to defendants, and the land taken and compensation made upon that basis and agreement. In all of this the defendants acquiesced and thereby became bound to maintain the stock-gap or otherwise protect the crops and land; but in violation of this duty they not only neglected to maintain the gap or otherwise protect the crops and land, but removed the stock-gap, thereby leaving the fields entirely exposed, as a result of which cattle and other animals had free access and devoured and destroyed the crops to an extent set forth in the declaration, which alleged further damage arising from animals going upon the land when wet, and packing it and rendering it hard for cultivation. In order to cultivate or make any crop, it was necessary for petitioner to build a fence of 1,800 panels, at a cost of \$360, and she asked that that amount be awarded for building the fence and \$40 per year for maintaining it, or whatever was reasonable for that purpose. She further alleged that it was the

duty of defendants to maintain the stock-gap, not only as a matter of law but as a matter of agreement at the time of the assessment of damages to right of way, and that the removal of the gap was malicious and for the purpose of damaging the crops and land. The defence to the action was, that the law imposed no obligation upon defendants to construct cattle-guards, and that the damages on account of condemnation of right of way and construction of the road had been duly assessed by a jury, and the amount of the verdict paid, and accepted in full satisfaction by the owner of the land.

The testimony for plaintiff tended to show the following: The Chatanooga, Rome and Columbus railroad-track runs for half a mile through the lot of land, and a side-track runs from it to the Rome and Decatur railroad. Bryan testified that it would take a half-mile of fencing to protect cultivated land along this main line, which fencing could be built for from \$150 to \$200, and it would take half this much more to fence the side-track, and it would cost \$10 to keep the fence in repair. Persons were constantly guarding the crops from cattle. It is very injurious to land for cattle to run over and pack it; for cultivation, land tramped and packed is worth only half as much as before, and it takes more than a year for it to get over tramping. The land in question was worth \$3 per acre for cultivation; it may be worth more than before the damage was assessed. Shropshire testified that he was on the jury that assessed the damages to the lot of land; Reece and Hal Wright, attorneys, were there; Reece was representing the Chattooga County Syndicate, which was headed by Cleghorn (who also was present), to furnish right of way through Floyd county to corporation of Rome; and Wright was probably representing McLendon. Shropshire supposed Cleghorn represented



the railroad or parties at interest; did not know that anything was said about the stock-gap definitely, but thought Reece mentioned about stock-gaps; did not hear Cleghorn say anything. Moore testified that he was present when the jury assessed damages; something was said about fencing, and Cleghorn said it was no use to consider that, that there would be stock-gaps built; Reece said the Supreme Court had decided a railroad was not obliged to keep up stock-gaps, which was new to witness, and it seemed so to Cleghorn, but Cleghorn said they would put in stock-gaps all along the line; and that question of fencing was withdrawn from the jury. Cleghorn was present at the trial of these cases all along the line. Moore thought the cost of protecting all the land by fence from the main and side-track would be \$100, and that the fence would not need repairs for six or eight years. One Price was a tenant under McLendon, and afterwards under the executrix in 1888, and his crop was badly injured, the witness could not remember to what extent. The landlord had a half-interest in Price's crop and a third in the corn of Jennings, another tenant, and a fourth in Jennings' cotton. This witness thought it would take from \$120 to \$140 to erect the fence. He could not estimate in dollars and cents the damage to the land by the tramping of the cattle, but supposed \$300 or \$400 up to the filing of the suit, from April 25, 1888, to March 5, 1889. The crop had to be guarded at night to save it. It was a regular pasture in common. The stock-gap was taken out by defendants a week after McLendon's death. Jennings got judgment for \$126.50, and Price one for \$97.50, against defendants. The lot was damaged \$200, another part of farm \$100, by cattle coming through the gap and running over it. The son of plaintiff testified that the field through which the railroad runs and the whole farm under one

fence was about 400 acres; the stock-gap was put in by the railroad company voluntarily, the last of March, 1888, and in the last of August, 1888, they tore it out; after a week or so they put in another higher up, and witness changed the fence to this new gap; a week after his father's death they tore it out, and the stock came in and ate up crops, and there was no way to keep them out; there was no way to fence; had not the stuff, and could hardly fence at all shaped like it is; witness went to see defendants' attorney about it, and he said Williamson would not put it in for less than \$250; had to keep a boy to mind the stock-gap; there was a good fence there before the gap was torn out, but since the gap was torn out it will cost \$900 to buy the timber, have it split and hauled and put up; the land was injured one half by the tramping of cattle; in 1888 the estate had, independent of the tenants, ten or fifteen acres of corn; the damage to the corn was one hundred bushels, to cotton \$50, to fruit \$200; witness lost ten or fifteen days himself at \$1 a day, to keep out cattle; never had any trouble except at the gap in northwest corner of the lot; could not imagine why they tore it out, unless Williamson thought he could get \$200 or \$300 out of "us"; it would take 20,000 rails to fence the Chattanooga, Rome and Columbus, and 10,000 to fence the Rome and Decatur; never had any trouble with the stock on the Rome and Decatur side. In evidence was the verdict of the jury of assessors, which was a finding in favor of S. D. McLendon, April 25, 1888, "for all damages and right of way through all of lot of land number 123 in 4th district and 4th section of said county; and we further find, upon the payment by said railroad company or its agent or attorney of the sum of \$450, that the title to the right of way, being a strip of land sixty-six feet wide through said land, shall be and is vested in said railroad company." Also a re-

ceipt to the Chattanooga, Rome and Columbus railroad, dated May 8, 1888, signed by S. D. McLendon, for \$450, "by the hands of C. C. Cleghorn, in payment of the within verdict." Also a letter dated September 17, 1888, from defendants' attorneys to the son of plaintiff, stating that the writer saw Williamson that morning in reference to the stock-gap question; that Williamson was not willing, after the Chattooga people had to pay \$450 for the right of way, to put in the stock-gap unless some of the money was refunded to them, and his figures to the writer were \$250; that the latter told him he knew McLendon could not do that much, and at Williamson's suggestion the writer had written to Cleghorn to come down, and would see if through him something could be done to give McLendon some relief in this vexatious matter. Also a letter dated October 18, 1888, from the attorney to Mrs. McLendon, stating that the writer had no authority to make any contract as to the stock-gap, and could only make recommendations to the company, which he had already done, and all he could now do was to refer her to Williamson, the president of the road; that the jury required the company to pay \$450 in full for all damages to the land, and that the company and they contend that the company is not bound to put in stock-gaps, but be that as it might, the writer trusted Mrs. McLendon and the president could arrange the matter.

The jury found for the plaintiff \$500. The defendants moved for a new trial upon the following among other grounds:

(1-3) Verdict contrary to law and evidence, and excessive.

(4) Error in admitting, over defendants' objection, the testimony of Bryan as to expense and cost of fencing off the right of way of defendants' road from the rest of the farm, and of the amount of fencing necessary

and the cost of keeping up a fence of that kind; the objection being, because all the damages to the land and the value of the right of way had been duly and legally assessed and adjudicated between the parties, the verdict and assessment being in writing and conclusive, and no parol or other testimony being admissible to contradict or vary it. (The judge certified that he admitted the testimony here complained of, because the suit was for damages arising subsequent to the verdict, and after the stock-gap was removed from the McLendon farm, and not to contradict or explain away the award, and because it was alleged the stock-gap was to remain.)

(8) Error in charging: "It is charged that this was maliciously done for the purpose of injuring the party, from the fact that they had already recovered a verdict; that is what the plaintiff claims. You look at the evidence and see whether there is any proof of that or not. What has the evidence disclosed? Does it disclose that it was maliciously done? If so, that is a fact which you may consider in making up your verdict here, in arriving at what the plaintiff in this action ought to recover."

The motion was overruled, and defendants excepted.

W. T. TURNBULL and W. W. BROOKES, for plaintiffs in error.

C. A. THORNWELL and J. BRANHAM, *contra*  
SIMMONS, Justice.

Under the pleadings and the evidence in this case, we think the court erred in not granting a new trial upon the 4th and 8th grounds of the motion. The 4th ground complains that the court erred in admitting the testimony of Bryan as to the expense and cost of fencing the right of way of the defendants' road, and the amount of fencing necessary and the cost of keeping up fencing

of that kind. Mrs. McLendon brought this suit as the executrix of her husband's estate. She made no *pro-fert* of her letters testamentary in her declaration, nor did she submit them to the court and jury; nor did she submit a copy of the will to the court to show how long she was entitled to hold this land as executrix. As far as appears from the record, she was only entitled to hold it a sufficient time to make distribution among the heirs of the testator; or, as far as we know from this record, this particular land may have been devised to a particular child or children, and if so, it would be manifestly improper to allow the executrix to recover from the railroad company for the purpose of building and repairing the fences in the future. Moreover, it is very doubtful whether she could recover damages of this kind or not, under the law. She had not built the fence, and it is not certain that she ever will build it; and it seems to us that she has recovered damages she has not yet sustained, for a fence she has not built. It is somewhat akin to the case reported in the celebrated Galt's Decisions, where one man sued another for "a well that he didn't dig."

We also think the court erred in charging the jury as complained of in the 8th ground of the motion. The charge in substance is that if the stock-gap was maliciously removed, the jury might take that fact into consideration in arriving at what damages the plaintiff ought to recover. This suit was brought upon a contract, and not for a tort; and in actions on contracts the amount of the recovery is the damage sustained by reason of the breach thereof. Our code, §2943, says: "Exemplary damages can never be allowed in cases arising on contracts."

*Judgment reversed.*

## BRYANT v. PUGH.

86	525
119	884

1. Where a tenant retained control and direction of the farm, and croppers worked it under his direction and were to receive a part of the crop as wages for their labor, the relation between them and the tenant was not that of landlord and tenant, but of master and servant; and a sale by them to the tenant's landlord of a part of the crop before the master was fully paid for his portion of the crop and for advances he had made to them, passed no title thereto. But where the tenant made an additional and separate contract with one of the croppers, by which it was agreed that the cropper was to pay \$60 for a crop which had been begun and abandoned by another, work it and give the tenant half, the remaining half to be bound for the \$60, this cropper became a renter of the land occupied by that crop, and the title to the crop raised on it was in him.
2. A refusal to charge which is shown by the evidence to have been no injury to the defendant, is not cause for setting aside the verdict.  
January 14, 1891. By two Justices.

Trover. Croppers. Master and servant. Landlord and tenant. Charge of court. Practice. Before Judge MEYERHARDT. City court of Floyd county. June term, 1890.

Pugh sued Bryant in trover for 4,381 pounds of seed-cotton and 31 bushels of corn, worth \$150. The evidence for the plaintiff tended to show the following: He rented a farm from defendant during 1889, and was to pay defendant one third of the corn, one fourth of the cotton and all the cotton-seed grown on the place. A part of this farm was worked by Caruth and a part by Graves. Plaintiff's contract with them was, that he would furnish the land and stock and tools, they were to work under his direction, and he was to have half the crop and they the other half. The crop was to be his until he was paid his part and all the supplies he might furnish them. He did not agree to furnish any given amount of supplies, nor all the supplies necessary to make a crop. He did agree to furnish the guano, and did so, and also furnished them some sup-

plies. They had arrangements with Bryant to get supplies, which plaintiff knew before he traded with them. He knew that Bryant took a mortgage after they traded. Bryant knew that plaintiff had furnished supplies. The property sued for was a part of the crop made by Caruth and Graves, which was delivered by them to Bryant's gin, where Bryant took control of it without plaintiff's consent and said he was going to sell it and put it in his pocket. The corn was a part of Caruth's crop which had been gathered, and plaintiff's half was paid to plaintiff, and twenty-five bushels of Caruth's part was levied on. The balance of Caruth's part was turned over to Bryant without plaintiff's consent, and this is what plaintiff has sued for. He made two contracts with Caruth: the first was for a crop for himself; the other was to work the crop begun by a man named Connell; the terms of the trade were the same for both crops, except that Caruth was to pay plaintiff \$60 for what supplies Connell had already got. A part of the cotton sued for was made by Caruth on his first crop, and a part on the Connell crop; one bale on the Connell crop and two on the Caruth crop; one bale was raised by Graves. The bales would weigh about 500 pounds each, worth ten cents a pound; and the corn was thirty bushels, worth fifty cents a bushel. Plaintiff claims three fourths of the Caruth cotton, one fourth of the Graves cotton, and all the corn; was not claiming the fourth he owed Bryant for rent. Caruth owes plaintiff for his part of the crop and supplies, more than his cotton and corn will come to, but Graves owes him nothing but plaintiff's fourth of Graves' cotton. Plaintiff gave directions as to the working of the crop, and managed and controlled it. Caruth got most of his supplies for making the crop from Bryant. The corn raised by Caruth was divided between him and plaintiff, and the thirty-one bushels, which was a portion of

Caruth's part, was taken possession of by Bryant, Caruth having told him it was there. He also told Bryant he was willing to sell the cotton and credit it on his debt to Bryant, if plaintiff was willing. The cotton was hauled to Bryant's gin on plaintiff's wagon, plaintiff's son helping to haul it, and the latter told "them" at the gin to keep the Caruth and Connell crops separate.

The testimony for the defendant tended to show: The plaintiff first rented the land to one Yarbrough who had begun to pitch a crop on it, and Caruth and Graves had begun with Yarbrough and plaintiff to make a crop. Defendant told plaintiff that defendant had agreed to furnish them supplies and would continue to do so, to which plaintiff agreed. Defendant did furnish them supplies to make their crops, and took a mortgage on the crop to secure him. They owe him more than the cotton in dispute will pay. Caruth delivered the corn to him, and he took it at fifty cents a bushel and gave Caruth credit for it on his debt. Caruth told him to sell the cotton and apply the proceeds to the debt he owed defendant, which defendant did. Defendant knew that plaintiff was furnishing some supplies, and that he furnished guano. Graves sold defendant his cotton, and he applied the proceeds to Graves' debt to him. The bales would weigh fully 500 pounds. When the cotton was brought to the gin, nothing was said about keeping the Connell and Caruth crops separate. Supplies were furnished by defendant to Caruth and Graves to an amount greater than the property in dispute. Plaintiff did not agree to furnish Graves any supplies, though he did furnish him a little for which Graves paid him. Graves told defendant that defendant could place Graves' part of the cotton on his debt to defendant. Half the cotton delivered to defendant belonged to plaintiff. The mortgages made by Caruth and Graves to defendant were introduced in evidence; they covered the



crop made by Caruth and Graves during the year in question, and were for a larger sum than the value of the property in dispute. Defendant also introduced a written contract between plaintiff and Caruth as to the Connell crop, which stated that Caruth was to pay \$60 for the crop, work it and gather it at the proper time and give plaintiff half, and that Caruth's part should remain bound for the \$60. Also, landlord's lien sworn out by plaintiff against Caruth for \$60, for supplies for the year in question. The affidavit recited that plaintiff rented land to Caruth for the year; that during the contract of renting he, as landlord, furnished supplies, and that he made the affidavit for the purpose of foreclosing his lien as landlord upon the crop raised by Caruth upon the land rented. The execution was levied on some of the corn made by Caruth during the year.

The jury found for the plaintiff \$120. The defendant moved for a new trial, which was denied, and he excepted.

DEAN & SMITH, for plaintiff in error.

NUNNALLY & NEEL, *contra*.

SIMMONS, Justice.

The facts of this case will be found in the official report. Under these facts we think Caruth and Graves were not tenants of Pugh, but croppers. The relationship between them and Pugh was not that of landlord and tenant, but was that of master and servant. Pugh retained control and direction of the farm, and Caruth and Graves worked it under his direction; and they were to receive a part of the crop as wages for their labor. The relation not being that of landlord and tenant, but that of cropper, it follows as a matter of course that Caruth and Graves, the croppers, had no title to the crops raised until Pugh was fully paid for his part of the crop and the advances made by him to

them, and that when Bryant bought a portion of the crops from them, he got no title thereto, and Pugh was entitled to recover that portion of the crop made by Caruth and Graves upon the land cultivated by them as croppers. It seems from the record that Pugh made two contracts with Caruth; the first for a crop for himself; and the other to work a crop for a man named Connell. The above ruling applies to the crop that Caruth was to work for himself; but not to crop begun by Connell and which Caruth worked; for under the evidence we think that, as to the Connell crop, Caruth was a tenant and not a cropper. The evidence shows that Connell had begun this crop and had quit or been discharged, and that Pugh made a written contract with Caruth in which it was agreed that Caruth was to pay \$60 for the crop, work it and give Pugh half, and that Caruth's part should remain bound for the \$60. This was not a contract by which Pugh was to give Caruth a part of the crop as wages for cultivating the land—as he did in the first contract made with him, but was a renting by Pugh to Caruth of that part of the land which had been in the possession of Connell. Caruth being a renter or tenant as to that part of the crop made on the Connell place, the title to that part was in him, and he had the right, therefore, to sell it to Bryant. The evidence shows that one bale of cotton was made by Caruth on the Connell place; and we have seen that the title to this bale was in Caruth and not in Pugh; and Pugh having no title to it could not recover it nor the price of it in an action of trover. Pugh claimed three fourths of the price of this bale, and the jury having found that much for him, the verdict was contrary to evidence to that extent.

The evidence also shows that Caruth made a certain quantity of corn on the land he worked as a cropper, and that the corn was divided between him and Pugh,

and his part levied on by Pugh by virtue of a landlord's lien; and the court was requested to charge: "If a part of the property sued for had been divided out to Caruth and delivered to him by Pugh, as to such part Caruth had title, even though the relation of cropper may have been shown." The refusal to give this charge, under the evidence in the case, did not injure Bryant, because by calculation it will be seen that the jury did not find the price of the corn for Pugh against Bryant. There were four bales of cotton made on the place, three by Caruth and one by Graves. Pugh claimed three fourths of Caruth's crop and one fourth of Graves' bale. Giving him the amount of cotton he claimed in his evidence, at the price of cotton stated therein and the weight of the bales, the verdict should have been \$125; but it was only for \$120, showing that if the value of the corn had been added to the verdict it would have been more. So we conclude that the jury did not find against Bryant for the value of the corn which had been sold him by Caruth, and if they did not, he had no right to complain of any ruling that the court may have made about the corn. The jury, as we have shown, having found for Pugh three fourths of the bale made by Connell, and that he had no title thereto and could not recover it from Bryant in an action of trover, we reverse the judgment of the court upon this ground. But if the defendant in error will, within thirty days after the judgment of this court is made the judgment of the superior court, write off from the amount of the judgment \$37.50, the value of three fourths of the bale made on the Connell place, the case will then stand affirmed.

*Judgment reversed on condition.*

POWELL, BROTHER & COMPANY v. BRUNNER & BROWDER,  
and *vice versa*.

88	531
90	728
86	531
117	475

1. A telegram from the defendant in *fi. fa.* to the claimants informing them of the seizure by the sheriff of the property in controversy is not admissible in behalf of the claimants on trial of the claim.
2. But the competent and uncontradicted evidence being that the transaction in question was a bailment for sale as the property of the claimants, they retaining the ownership so long as the property remained unsold, the improper admission of the telegram is not cause for a new trial.
3. Where the evidence shows that the consignee paid something upon a certain bill of goods, it not appearing how much was paid, the presumption is that it was only so much as ought to have been paid according to the terms of the consignment.

January 19, 1891. By two Justices.

Claim. Evidence. Bailment. Payment. Presumption. Before Judge ATTAWAY. City court of Cartersville. June term, 1890.

AKIN & HARRIS, for plaintiffs.

J. B. CONYERS, for claimants.

BLECKLEY, Chief Justice.

The mortgages made by Gilbert to Powell, Bro. & Co. in April, 1889, covered generally the stock of goods and merchandise of Gilbert kept in store, and one of them was so framed as to apply to the stock however it might change in specifics. At the time the seizure was made under the *fi. fas.* founded on foreclosure of the mortgages, certain flour was in store mingled with Gilbert's goods. This flour was seized as a part of the stock and was claimed by Brunner & Browder as their property. Upon the trial of the claim the jury found in their favor. A motion made by the plaintiffs in *fi. fa.* for a new trial was overruled.

1. The telegram sent by Gilbert to the claimants saying "I have bursted; sheriff moving your goods; come at once," was not admissible evidence in their

favor. It indicates upon its face that it was written and sent after the levy was made and whilst the sheriff was engaged in moving the goods. It was therefore a mere declaration on the part of Gilbert recognizing title in the claimants after he had virtually lost possession of the property and after the matter in controversy between the plaintiffs and the claimants had arisen.

2. But this error is not sufficient cause for reversing the judgment. The evidence of title in the claimants was ample and uncontradicted. They had furnished the flour to Gilbert in January, 1890, for sale on consignment. Gilbert was their bailee, and although he had an option to purchase at a fixed price, he had not exercised that option so far as any of the flour which remained on hand was concerned. The right of a bailee to purchase on his own account at a fixed price, coupled with the duty of accounting also at a fixed price for any sales actually made, will constitute him a purchaser only as to the property covered by his actual sales and leave his original character as bailee unchanged with respect to that part of the property which remains unsold. *Nutter v. Wheeler*, 2 Lowell, 346. It may be that this rule should be confined to cases in which, as in the present, no credit has been extended to the bailee on the faith of the consignment. The evidence shows that at the time of the bailment it was matter of express agreement between the parties that the title to the flour should remain in claimants until it was paid for, and that the flour was to be sold as their property. There is no evidence that Gilbert held it out or treated it as his own. The mortgage debts were pre-existing debts; the mortgages were executed many months before the flour went into Gilbert's possession.

3. The flour claimed consisted of thirty half sacks and forty-two quarter sacks. These packages were

identified as part of a lot amounting to twenty-four barrels of flour embraced in one and the same bill. The witness testified that Gilbert had paid some money on the bill, but how much he did not know. The plaintiffs insisted that it was incumbent on the claimants to prove the amount so paid as it was within their power to do so by their books or otherwise, and that, as they failed to produce the evidence, the presumption would arise, not only that the flour sold by Gilbert had been paid for, but also the whole or a part of that which remained unsold. We think otherwise. Gilbert's contract was to pay for the flour when and as he sold it. He was under no duty to pay for any portion not sold. The presumption therefore is that he paid to the extent of his sales but not beyond them.

The evidence on the merits controlling the case absolutely in favor of the claimants, any errors of the court in matters of practice were wholly immaterial. There was no error in denying a new trial.

The claimants having succeeded in the court below and also in this court on the principal case, their cross-bill of exceptions is dismissed. *Judgment affirmed.*

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FLEMING & COMPANY v. RAY *et al.*

86	538
119	843

1. A devise by a mother to her son, his wife and children, he to have the property as a home during his life, and his wife also should she survive him, and after the death of both, the property to be equally divided among his children, creates in the children only an estate in remainder, and their vendees who have never been admitted into possession, cannot recover the premises in ejectment before the determination of the estate for life.
2. The attestation by a father of a deed executed by his adult children conveying in fee simple "all the respective rights and interest in and to a certain tract or parcel of land," describing it, will not estop him from subsequently acquiring an estate for his life in the same land by the will of his mother, under a devise to himself for life and to his children in remainder.

January 19, 1891. By two Justices.

Ejectment. Estates. Remainders. Deeds. Estoppel. Before Judge JENKINS. Greene superior court. March term, 1890.

An action of ejectment was brought on August 17, 1889, upon the demise of T. Fleming & Company against Eva Brightwell, Nancy A. Butler, J. R. Ray, and T. M. Fambrough as trustee of the minor children of B. F. Ray, son of Nancy Ray, who died on or before December 6, 1886, testate. The property named in her will (set out in the opinion) is the property covered by the pleadings. J. R. Ray, Nancy A. Butler and Eva Brightwell are the only children of B. F. Ray and his first wife, S. E. Ray, who was in life at the death of the testatrix and has since died. The three children were in life at the death of testatrix, and were *sui juris* on April 17, 1880, when they made to T. Fleming & Company the deed quoted in the opinion. To this deed B. F. Ray was one of the subscribing witnesses. Since the death of the testatrix B. F. Ray has married a second wife, by whom he has two minor children for whom T. M. Fambrough is trustee and was represented in the superior court by the general counsel for the defendants; and B. F. Ray and children are living on said land. The judge, to whom the case was submitted, decided in favor of the defendants, and the plaintiffs accepted.

H. T. LEWIS, for plaintiffs.

No appearance for defendants.

BLECKLEY, Chief Justice.

1. The testatrix died on or before a certain day in 1886. The deed executed by the three adult children of B. F. Ray and attested by Ray himself, bears date in 1880, about six years before the will took effect. The deed is in these words:

"State of Georgia, County of Greene: For and in consideration of the sum of three hundred and twenty-

two and 53/100 dollars we the undersigned have this day bargained sold and conveyed and do by these presents bargain, sell and convey unto T. Fleming & Co. their heirs and assigns all of the respective rights and interest in and to a certain tract or parcel of land containing one hundred acres more or less, situate lying and being in said county adjoining lands of Wm. Jewell, Columbus Heard and others. To have and to hold the above bargained rights and interest in and to the above described property, unto the said T. Fleming & Co., their heirs and assigns forever in fee simple. In witness whereof we have hereunto set our hands and seals, this the 17th day of April, 1880."

Signed by the makers, and attested by two witnesses.

It will be observed that the instrument contains no warranty of title, and that it does not purport to convey the land itself but only "the respective rights and interest" therein. What rights and interest? Those of the makers of the deed, as these persons had no power or authority over the rights and interest of any one else. The agreed statement of facts on which the trial judge decided the case does not show to whom the land belonged at the date of the deed, or who had possession of it then or at any other time, save that "B. F. Ray and children are living on said land." It is the same land, however, which is embraced in the will of B. F. Ray's mother, and as nothing to the contrary is stated, the judge was warranted in inferring that the land was hers when she died in 1886. If the fact was otherwise, the will would be wholly irrelevant. Treating the land as her property, it passed under her will, and the construction of that will controls the case. Its language is as follows:

"I give unto my son B. F. Ray all that I now have, both real and personal, consisting of a tract of land whereon I now live, adjoining lands of Wm. Jewell and containing 100 acres, be the same more or less, and other property that I may have at the time of my death, to have conditionally. The before mentioned property



I give to the said B. F. Ray and his wife and children, in trust; the property is not liable for the said B. F. Ray's debts in any way whatever; he has the property as a home as long as he lives; his wife, Sarah E. Ray, if the said B. F. Ray should die, to have a home or the interest arising as long as she lives in the same way; and then at the death of both B. F. Ray and S. E. Ray his wife, I wish the property to be equally divided among his children, now only three, Nancy A. Ray, Sarah E. Ray and John H. Ray, and if any more legitimate children they will be made equal heirs with the above written. I constitute my friend T. M. Fambrough my trustee to hold the title in his name for the aforesaid, and I enclothe him with full power to sell the land or anything else that I have given and invest the proceeds in the same kind of property in any other section that he may think best so to do, provided the family or those of them that may be grown wish the same to be done; the proceeds of the place, rents or crops, the trustee will let the family consume, but not subject for any debt that he does not sanction. The trustee may not make any return of his acts as trustee, only to act for them and see that the said property is not wasted."

The will is without date, and there is a strong probability that it was in existence when the deed of 1880 was executed, and that the purpose of that deed was to convey the interest of the three adult children which was expected to vest in them under this will at the death of the testatrix. The code declares, §2699, that "The maker of a deed cannot subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped from denying his right to sell and convey." Let it be conceded that this provision would apply to such a deed as that made by these children to the plaintiffs in 1880, the estoppel would operate only as to three of the defendants in ejectment, but would not affect the fourth, that is, Fambrough the trustee mentioned in the will. He could defend on the life estate in B. F. Ray as an outstanding and better

title for the time being than that of the plaintiffs. And it was upon the right to recover against all of the defendants, not the right to recover against some of them separately, that the trial judge was requested to adjudicate. And the case was argued here in the same way, the contention being that the trustee was not protected by the terms of the will from a recovery at the instance of the plaintiffs. We think it clear that whether the children of B. F. Ray by his second marriage will be entitled at his death to participate in the division of the property or not, so long as he lives the right to the possession is in him, and that the trustee is entitled to assert that right as against the vendees of the adult children. Under a fair and reasonable construction of the terms of the will, taken as a whole, the devise is to Ray, his wife and children, he to have the property as a home during his life, and after his death the property to be equally divided. It is doubtful whether his children by a second wife will be entitled to share in the division or not, but that question is not necessarily involved in this litigation. None of his children took more than a remainder except the right to enjoy with him as members of his family, and the life estate not having determined, the remaindermen are not yet to be admitted as such into possession. The actual possession, according to the agreed statement of facts, is in "B. F. Ray and his children," by which we suppose is meant his minor children by the second wife, since the others were all *sui juris* in 1880, and from the names of the females we infer that they were then married and no longer members of their father's family.

2. The suggestion that B. F. Ray was estopped from acquiring title from his mother through her will because he attested the deed of his children to the plaintiffs is altogether fanciful. The deed is not inconsistent with his right to take his mother's subsequent bounty.

It does not even appear that he knew the contents of the deed; but if he did, he had no interest in the land at that time, and surely he was under no obligation to give warning of his mother's title though he may have been bound to disclose his own. The facts are altogether unlike those in the case of the *Georgia Pacific v. Strickland*, 80 Ga. 776. Surely there is no law which inhibits a witness to a deed from acquiring an adverse title by purchase, inheritance or devise. The morality of conveyancing has not yet risen to this sublimated height.

*Judgment affirmed.*

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OUSLEY v. THE CENTRAL RAILROAD AND BANKING CO.

1. Where the evidence shows that a draw-bar supplied by a railway company to be used in coupling cars was used on two occasions, working well on the first, but failing to work on the second, though twice tried in a proper manner, a jury might, in the absence of any explanation from the company, infer that the implement was defective.
2. A second effort on the same occasion to couple cars with a draw-bar, the first having failed because the bar had become fixed in its position and not readily movable, is not necessarily improper or inexcusable, where the bar had been shaken loose after the first effort and before the second was made, although the second failed for the same reason as the first and the plaintiff was thereby injured.

January 19, 1891. By two Justices.

Negligence. Railroads. Master and servant. Before Judge JENKINS. Wilkinson superior court. April term, 1890.

Reported in the decision.

GUSTIN, GUERRY & HALL, for plaintiff.

LAWTON & CUNNINGHAM and CALHOUN, KING & SPALDING, for defendant.

BLECKLEY, Chief Justice.

It would be safer to submit this case to a jury. The evidence shows that the draw-bar was used in Macon

and worked well. The next attempt at using it was at Gordon, when it proved to be tight so that it could not be raised at the first trial. It was shaken loose and another trial was made, when it again failed to work and the plaintiff was injured in consequence. This is all we know from the evidence touching the history of this draw-bar, save that, after the plaintiff was injured, the coupling was successfully made by some other person.

1. A jury could infer that the draw-bar was defective it having failed in its proper functions twice out of three attempts at using it. It would not be unreasonable to conclude that an implement which proves inefficient in two thirds of the instances of its use, is not a fit implement to be supplied by a railway company to those of its employees who are engaged in such hazardous service as coupling cars.

2. The court seems to have ordered the nonsuit because the plaintiff ought to have desisted after making one effort to couple the cars at Gordon, and that he was in fault for making a second effort. But a part of the plaintiff's testimony was as follows: "At Gordon, when the engine came back once and I saw that the coupling would not go high enough, I took the bar and shook it, and it shook loose. It was tight at first. I made one trial when it seemed to be tight, and the bar would not raise. That was the reason I did not make the coupling. I shook it loose after that. It had grown tight in the motion between Macon and there. Do not know what caused it. When I went to raise it next time, it was tight. . . The two efforts I made at Gordon, I suppose, were about two minutes apart, maybe not quite so long." It will be observed that, before making the second effort, the plaintiff had shaken the bar loose. This being so, had it been a proper bar, he might reasonably conclude that it would remain loose long enough to be used in making the coupling.

It at least raises a question for the jury whether, under all the circumstances, he would be warranted in arriving at that conclusion and in making the second effort to effect the coupling. To make the second effort was not necessarily improper or inexcusable.

The court erred in granting a nonsuit.

*Judgment reversed.*

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MILNER *et al.* v. VANDIVERE *et al.*

1. In a joint action by tenants in common for the recovery of land, where an equitable defence had been filed, it was error to charge the jury that if for any reason any of the plaintiffs could not recover, none of them could recover. Under the practice in this State, where an equitable defence is set up and prevails against the right of any of the plaintiffs to recover, the common law rule as to actions of ejectment, that all the plaintiffs shall recover or none, does not apply, but the same rule and measure of justice is to be applied as in proceedings in equity.
2. If the sale which purported to convey the legal title of the plaintiffs to the land in controversy was illegal, the legal title was still in them, and the law did not require them, before bringing their action, to tender the defendant the amount of the purchase money he had paid for the land. It was therefore error to charge the jury that if the mother of the plaintiffs sold the land to the defendant and used the money received therefor in the support of the plaintiffs or any of them, the plaintiffs could not recover unless they tendered back the amount of the purchase money prior to the bringing of the action, or unless he had realized it from rents over and above the value of the improvements.
3. The action was by some of the heirs at law of the deceased owner. The equitable plea of the defendant set up, among other things, that the land was sold at administrator's sale to raise money for a year's support set apart by the ordinary for the widow and the minor children; that the purchaser at the sale resold to the widow, who in turn sold to the defendant; that he was an innocent purchaser without notice of any defect or irregularity, and that the purchase money paid by him was used for the support and maintenance of the widow and the minor children. The plaintiffs contended that the year's support was not properly set apart and that the sale was illegal and unauthorized. *Held*, that if it should appear at the next trial that the year's support was properly set apart to the widow and minor children, and that the land was sold

86	540
87	77
86	540
114	450
86	540
124	164

to raise money for the year's support, and sold at a fair price, and the money was used by the widow and the minor children for their support and maintenance; or, whether the year's support was properly set apart or not, if the other facts stated should appear, and it should also appear that the amount thus paid by the defendant and used by the widow and minor children for their support and maintenance, was a fair and reasonable amount to be allowed them for a year's support, this would show an equity on the part of the defendant superior to the legal title of the plaintiffs. If it should appear, however, that the widow and only a part of the minor children used the money for their support and maintenance, the other minor children receiving no benefit therefrom, the legal title of the latter would be superior to the defendant's equity, and they might recover, although their co-plaintiffs could not.

4. The specification in the bill of exceptions of the parts of the record material to a clear understanding of the errors complained of, does not include any demurrer to the declaration. The clerk therefore had no authority for certifying any such document as a part of the record; and neither the demurrer nor any rulings of the court thereon, nor any exception thereto entered *pendente lite*, can be considered as authenticated so as to be properly before this court.

January 19, 1891. By two Justices.

Ejectment. Equity. Actions. Tenants in common. Title. Year's support. Practice. Before W. K. MOORE, Esq., judge *pro hac vice*. Bartow superior court. January term, 1890.

The equitable plea referred to in the opinion (which states all the other facts here material) alleged, in brief, as follows: James Milner, the husband of Mrs. Sue M. Milner, one of the plaintiffs, and the father of the other plaintiffs, died intestate in July, 1872, leaving his widow and the other plaintiffs and other children as his heirs at law, and an estate of real and personal property worth about \$1,200 or \$1,500. One of his sons, Oscar H. Milner, was appointed and qualified as his administrator, and took control of the estate; and in January, 1873, he obtained of the court of ordinary an order to sell all the lands belonging to the estate for the purpose of paying its debts. Soon afterwards he resigned and

abandoned the administration, and removed from the State without ever making any inventory and appraisement, leaving the estate unrepresented, and the widow and minor children destitute and with no means of support except the property belonging to the estate. On April 7, 1873, Mrs. Sue M. Milner applied for a year's support to be set apart to her and six minor children out of the estate; and in March, 1874, the return of the appraisers was made the judgment of the court of ordinary, setting apart the household and kitchen furniture and \$1,383.53 in money to be paid by the administratrix of James Milner. On May 5, 1873, Mrs. Sue M. Milner was appointed and qualified as administratrix of the estate, and filed an inventory and appraisement of all the property belonging thereto. She took charge of the estate, and in pursuance of an order of the ordinary, and after legal advertisement, she sold all the lands of the estate, including the land in controversy, at public outcry for \$825, Thomas W. Milner being the purchaser; and to him she made her deed to said lands. He afterwards sold them to her, and she took charge of them as her own. On December 17, 1873, and on January 14 and July 24, 1874, she sold to the defendant, for \$270, four of the lots of land in dispute, they being vacant, uninclosed and unimproved. She sold another of the lots, vacant, uninclosed and unimproved, to one Feemster, who, in consideration of \$25, sold the same to the defendant. The sums paid to her for these lots were their full market value; and the defendant bought them in good faith and went into possession without any knowledge of any irregularity or illegality, if any there was, in the mode by which she secured her title. Believing that the title to the property was good, he made permanent and valuable improvements thereon, consisting of a dwelling-house and fencing, etc., of the value of \$1,000. The plaintiffs never paid any taxes on

the property after he bought, but he paid the State, county and city taxes, and has occupied the premises by himself and his family continuously until now; and all of the plaintiffs are insolvent. On July 6, 1874, Mrs. Sue M. Milner, as administratrix, filed her annual return which was approved and admitted to record, showing a disposition of the assets of the estate. The money arising from the sale of the lands in dispute was used by her for supplying herself and her minor children with the actual necessities of life. Then follow the prayers, which need not be stated.

J. A. BAKER, R. J. McCAMY and W. I. HEYWARD, for plaintiffs.

J. B. CONYERS, for defendant.

SIMMONS, Justice.

This was an action of ejectment brought by W. H. Milner, Emma J. Mosley, John L. Milner, James L. Milner, E. B. Milner, T. P. Milner, Ernest Milner and Kitty C. Stocks, heirs at law of James Milner, deceased, against A. G. B. Vandivere, for the recovery of a certain tract of land described in the declaration. By an amendment the names of Mrs. Mosley and Mrs. Stocks were stricken from the declaration. The defendant filed the plea of not guilty, and also the further plea that he had been in the actual and continuous adverse possession of the premises under written evidence of title for more than seven years before the commencement of the suit, and that the plaintiffs' right of action was barred by the statute of prescription. He also filed an equitable plea setting up certain equities as a reason why the plaintiffs were not entitled to recover; which will be found in the report of the case. Both sides submitted evidence to the jury which it is unnecessary to detail here. Under the charge of the court the jury returned a verdict for the defendant. The plaintiffs moved for a new trial on the several grounds set out



therein, which was overruled by the court, and they excepted.

1. The following instructions of the court to the jury were complained of in the 4th and 5th grounds of the motion for a new trial: (4) "If you believe from the testimony that Mrs. Sue M. Milner, the mother of the plaintiffs, sold this land to the defendants or either of them, and used the money received for the land in the support and maintenance of the plaintiffs or any of them, then I charge you that the plaintiffs cannot recover, unless you find from the evidence that they tendered back to the defendants the amount of this purchase money prior to bringing this action; or unless you should find that the rents and mesne profits arising from the property sued for would amount to the improvements placed on the premises by the defendants or those under whom they held, and also enough over and above the improvements to pay back the original purchase money, prior to the beginning of this suit." (5) "The court charges you further that the demise in this declaration is a joint demise, and if for any reason any of the plaintiffs cannot recover, none of them can recover. And if you find, for instance, that any of them are barred, you should find by your verdict who are barred, and name them."

Under the facts of the case we think the court erred in giving the above in charge to the jury. It will be seen that the jury were instructed that if the mother of the plaintiffs sold the land to the defendants or either of them, and used the money received from the land in the support and maintenance of the plaintiffs or any of them, the plaintiffs could not recover; also, that if for any reason any of the plaintiffs could not recover, none of them could recover. It is true this court has held in several cases that where tenants in common bring a joint action for the recovery of land, and it is

shown at the trial that either of them has no title or right of entry and possession, the action fails, although the others may have the title and the right of entry and possession. *De Vaughn v. McLeroy*, 82 Ga. 713, and cases there cited. This is the law of our State where the action is purely legal; and it will be seen by reference to the cases cited that they were all legal actions, and in none of them was an equitable defence filed. But we think that where plaintiffs bring a joint action of ejectment, and the defendant does not rely merely upon a legal right to defeat the action, but sets up an equitable right against the right of any or all of the plaintiffs to recover, the rule does not apply, and the action does not fail unless the equitable defence prevails against all the plaintiffs. If the defendant shows an equity superior to the legal title of all the plaintiffs, none of them can recover; if he shows an equity superior only to the legal title of some of the plaintiffs, and not to that of the others, the former cannot recover, while the latter can. In other words, if A, B and C, being tenants in common, bring a joint action against D, for the recovery of land, and D shows a superior equity to the legal title of B and C, and not to that of A, A can recover and B and C cannot. This rule naturally and of necessity arises from the blending of legal and equitable jurisdictions. Under the old practice, in an action of ejectment at law, a recovery could only be had upon the legal title to land. The holder of an equitable title could neither support the action nor set up his equitable title as a basis of affirmative relief, or to defeat a recovery based upon the legal title. The rights of the holder of the equitable title could only be asserted and established in equity. Injunctions were frequently granted to restrain ejectment by the holder of the legal title during the pendency of the proceedings in equity upon the equitable title. The defend-

ant may now, under our practice, interpose equitable as well as legal titles or defences; and when equitable defences are set up against legal titles, the same rule and measure of justice is to be applied as if the proceeding was in equity. Sedgwick and Wait on Trial of Title to Land, §485. Under the old practice, if the defendant's equity was superior to the legal title of either or any of the plaintiffs, the court would enjoin those plaintiffs from prosecuting their action at law against the defendant, but would refuse to enjoin those whose legal title was superior to the defendant's equity. And therefore, as the defendant, under our practice, can set up his equity by an equitable plea to an action at law, we think that where he files such plea, the common law rule that all shall recover or none does not prevail. Indeed it has been so held by this court. In the case of *Rumph v. Truelove*, 66 Ga. 480, it is said: "Whatever might be held to be the rule as to a joint demise, where the general issue only is pleaded, it is unnecessary in this case to decide, as under our liberal practice, equitable pleas involving other matters than title may be introduced and adjudicated. This very right necessarily abrogates any such common law rule." See also *Pomeroy on Remedies and Remedial Rights*, §§209-215; *Allen v. Logan*, 10 S. W. (Mo.) 149-151.

2. We think the court also erred in charging the jury that it was necessary for the plaintiffs in this case to tender the purchase money to the defendant before bringing their suit, unless he had realized it from rents over and above the value of the improvements. If the land had been illegally sold, the legal title was still in the plaintiffs, and we know of no law that requires the plaintiff under such circumstances to tender to a defendant who is in wrongful possession the purchase money which he has paid for the land, even though he pays it in good faith believing he is getting a good

title. If the legal title is in the plaintiffs, they are entitled to recover the land unless the defendant shows a superior equity to that title; and they are not required to tender the defendant the purchase money he has paid before they can bring suit to recover the land.

3. If on the next trial of the case the defendant can show that the year's support was properly set aside to the widow and minor children, and the land was sold to raise the money for the year's support, and was sold at a fair price, and that the money was used by the widow and the minor children for their support and maintenance, then in our opinion this would show an equity on the part of the defendant superior to the legal title of the plaintiffs. If it should appear, however, that the widow and only a part of the minor children used the money for their support and maintenance, and others of the minor children received no benefit therefrom, then the legal title of the latter would be superior to the defendant's equity, and they might recover, while their co-plaintiffs could not. Or if on the next trial the defendant can show that the land was sold for a fair price, and the proceeds of the sale used by the widow and the minor children, and the amount thus used by them was a reasonable amount to be allowed them for a year's support, then in our opinion the defendant's equity would be superior to the plaintiffs' legal title, whether the year's support had been properly set aside or not. *Simmons v. Byrd*, 49 Ga. 286; *Barron v. Burney*, 38 Ga. 264; *Cross v. Johnson*, 82 Ga. 67.

4. The parts of the record specified in the bill of exceptions as material to a clear understanding of the errors complained of are, (1) original declaration with all the amendments thereto; (2) the equitable pleas of the defendants filed in the clerk's office on the 4th day of February, 1890; (3) the motion for a new trial and

the amendment and all the orders of court with reference thereto, rule *nisi*, etc.; (4) the entire brief of evidence filed and approved. It will be seen that this specification does not include any demurrer to the declaration. The clerk, therefore, had no authority for certifying any such document as a part of the record. Consequently, neither the demurrer nor any rulings of the court thereon, nor any exception thereto entered *pendente lite*, can be considered as authenticated so as to be properly before this court. It follows that the assignment of errors by the defendant in error on rulings said to have been made *pendente lite* have nothing to rest upon and cannot be considered. Had the defendant in error desired any part of the record brought here which was not specified in the plaintiffs' bill of exceptions, the act of 1889 (Acts of 1889, p. 114) pointed out to him the mode of accomplishing his purpose. That mode not having been pursued, this court must simply ignore so much of the transcript as the clerk below has sent here without any authority.

*Judgment reversed.*

86 548  
100 362

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WILLIAMS v. THE STATE.

1. On the trial of a man charged with adultery and fornication with an unmarried woman, after proof that the woman was married, her declaration (she being present in court), made three years previously, that she had heard her husband was dead, is not admissible to prove his death; it not appearing from whom her information was derived.
2. The evidence showing that the female was a married woman, and there being no legal testimony to show that her husband was dead at the time of the alleged criminal act, a verdict of guilty was contrary to the evidence.

January 19, 1891. By two Justices.

Criminal law. Evidence. Adultery and fornication. Before Judge ATTAWAY. City court of Cartersville. June term, 1890.

Reported in the decision.

J. B. CONYERS, for plaintiff in error.

A. W. FITE, solicitor-general, *contra*.

SIMMONS, Justice.

Williams was indicted and tried for the offence of adultery and fornication with one Fanny Smith, alleged to be an unmarried female; and was convicted. During the progress of the trial, Wilkerson was introduced as a witness by the State, and testified as follows: "I knew Fanny Smith's husband; his name was Charley Smith. About six or seven years ago I had Charley Smith at work on the streets under sentence. After his time was out he left here and went to the State of Alabama. Soon after he left here, Fanny Smith came here in search of Charley Smith and said he was her husband. I told her that Charley had gone to Alabama, but she did not leave here and go to Alabama in search of him. Fanny Smith told me she heard that her husband, Charley Smith, was dead. This was about three years ago. She did not tell me that she knew of her own knowledge that her husband was dead; she did not tell me that she heard it from any member of her own family or her husband's family." The defendant's counsel objected to the witness's testifying that Fanny Smith told him that her husband was dead, on the ground that it was hearsay and inadmissible. The objection was overruled, and the defendant made this one of the grounds of his motion for a new trial.

We think the objection should have been sustained and the testimony excluded by the court. It will be observed that the witness states that Fanny Smith did not tell him that she heard it from any member of her own family or her husband's family, nor did she state how she heard it; nor that it was the general reputation in her family or in that of her husband; but simply

that she had heard that he was dead. It was not stated that it was even a report in the community; or if there was such a report, that it had been accepted by or known to the family of Smith. "This does not come within any exception which allows declarations of deceased members of a family, or reputation in the family, to be received as evidence of facts relating to pedigree, but under the general rule that hearsay evidence and common rumor are incompetent to prove particular facts." See *Blaisdell v. Bickum*, 139 Mass. 250; *McGrew v. State*, 13 Tex. App. 340; *State v. Wright*, 70 Iowa, 152, 80 N. W. Rep. 388; *Ross v. Loomis*, 20 N. W. 749; *Johnson v. Johnson*, 3 N. E. Rep. (Ill.) 232. The admission of the evidence was specially erroneous because it appears from the record that Fanny Smith was in court and was a competent witness to prove whether she was married or single at the time of the commission of the alleged offence.

It was argued, however, by the solicitor-general, that if testimony of this character is not to be admitted, it will in many cases be impossible to convict parties of the offence; because it is often impossible to prove whether the parties are married or single. It seems to us that this difficulty could be easily obviated by putting two counts in the indictment, one charging that the offence was committed with an unmarried woman, and the other charging that it was with a married woman. In coming to our conclusion that this evidence was inadmissible, we have not overlooked the case of *Imboden v. Etowah Mining Company*, 70 Ga. 86, where it was held that "hearsay as to death is admissible testimony." That case has had but little weight with us in coming to our conclusion. We have read it carefully, and do not find from the report thereof under what state of facts the testimony was admitted. The proposition that "hearsay as to death is admissible" may be sound

law or it may not, depending altogether upon the state of facts sought to be proved. There is no doubt that hearsay evidence of the death of a person is admissible under certain circumstances. Code, §3772. But what we hold in the case now under consideration is, that the circumstances in this case did not authorize the admission of the testimony excepted to; and inasmuch as the indictment charged the defendant with adultery and fornication with an unmarried woman, and the testimony shows that she was a married woman, and there was no legal testimony to show that her husband was dead, the jury found contrary to the evidence, and the court below should have granted a new trial.

*Judgment reversed.*

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HARDY v. WILLIAMSON.

88	551
110	647
111	419

The libel alleged in the declaration was the publication in a newspaper of the following: "Either by erroneous classification, or classification obtained by the brick company and their subcontractors, by collusion with the subordinate engineers of the construction company, or some of them, the work of the Chattahoochee Brick Company has been overestimated to the extent of at least one hundred thousand dollars, and probably one hundred and fifty thousand dollars." The declaration alleges that these words were falsely and maliciously written and published by the defendant of and concerning the plaintiff, who, it was alleged, was one of the subordinate engineers of the construction company employed for and in charge of the classification and estimating of the work of the Chattahoochee Brick Company; and that these words were intended by the defendant to charge and accuse the plaintiff with falsely and fraudulently colluding with the brick company and its subcontractors to cheat, defraud and swindle his employer, the construction company; and the declaration avers extraneous facts to show that they had reference to him, and were so understood and received by those who read them and the public at large. *Held*, that the court erred in sustaining a demurrer to the declaration on the ground that the facts as stated therein did not make a cause of action sufficient in law to authorize a recovery against the defendant.

- (a) Even where the words used may at first sight appear only to apply to the subordinate engineers as a class, and not to be specially de-



famatory of any particular one of them, still if the plaintiff can satisfy the jury that they referred especially to him, he would be authorized to maintain the action.

- (b) It was unnecessary that a specific crime should be charged to enable the plaintiff to maintain his action. Charges made on one in reference to his trade, office or profession calculated to injure him therein are actionable, and no special damage is essential to support the action. Besides, the words, if written of and concerning the plaintiff, accused him of an offence amounting at least to moral turpitude.
- (c) Nor does it make any difference that the words were put in the disjunctive, to wit, "the subordinate engineers of the construction company, or some of them." It may turn out on the trial that the expression "or some of them" was used because the writer did not mean that all were guilty, but that the plaintiff alone or with others was guilty.

January 19, 1891. By two Justices.

Libel. Before Judge MADDOX. Floyd superior court.  
March term, 1890.

Reported in the decision.

HENRY WALKER, by brief, for plaintiff.

DABNEY & FOUCHE, for defendant.

SIMMONS, Justice.

We think the court below erred in sustaining a demurrer to the declaration on the ground "that the declaration did not present such a statement of facts or causes of action as entitled the petitioner to maintain the suit, and that the facts as stated in the declaration did not make a cause of action sufficient in law to authorize any recovery against the defendant." The plaintiff asserts in his declaration, in substance, that the defendant was president of a construction company which had contracted to build a certain railroad; and that the plaintiff and ten others were employed as subordinate engineers by the defendant to survey, lay out and superintend the work on the railroad and the several residencies thereof, and to estimate and classify the work as it was done from time to time, in order that the construction company might settle with and pay

off its subcontractors; that the construction company subsequently sublet the building of the railroad to the Chattahoochee Brick Company, and that the latter company constructed the road; that the plaintiff and the other subordinate engineers, as officers and employees, were placed in charge of the work, and it was their duty to survey, lay out and superintend the building of the railroad for the construction company, and they were employed and paid by the construction company for this service; that the plaintiff was placed in charge of the "6th residency" on the railroad, which extended a distance of eleven miles, and embraced sections 52 to 62 inclusive; that he made monthly estimates of the quantity of earth and material moved and work done by the brick company as a basis for monthly settlements by the construction company with the brick company; that he and the other engineers mentioned performed their duties skilfully and honestly, and complied fully with their contract in relation thereto; and that thereafter the construction company pretended to dispute the classification and estimate made of the work by the plaintiff and the other officers and engineers, and denied its indebtedness to the brick company for the unpaid balance due that company, and the brick company thereafter began suit against the construction company to recover the same, but that pending an accounting between the parties before an auditor, the construction company admitted its liability, settled it in full and paid the brick company the balance due it by the construction company; that when the controversy first began, the defendant falsely and maliciously published the following false and defamatory libel of and concerning the plaintiff and the manner in which he had performed his work, and of his honesty and integrity as a man, and his fitness and capacity as a civil engineer, to wit:

“Either by erroneous classification, or classification obtained by the brick company and their subcontractors, by collusion with the subordinate engineers of the construction company, or some of them, the work of the Chattahoochee Brick Company has been overestimated to the extent of at least one hundred thousand dollars, and probably one hundred and fifty thousand dollars.”

The declaration alleges that the defendant caused all the sections of the railroad embraced in residency number 6, of which the plaintiff had charge and had surveyed and examined and the work on which he had estimated for the construction company, to be re-examined and re-surveyed and the work done thereon re-estimated; and that the words above set out and published and herein complained of were written and published by the defendant whilst the work of re-examining, re-surveying, re-estimating and re-classifying this residency and the several sections thereof was going on and before the same was completed, and were understood by the public at large to apply to the plaintiff, and were so received and considered by them, and were so used, intended and designed by the defendant. By all of which it was designed and intended by the defendant to charge and accuse the plaintiff with falsely and fraudulently colluding with the brick company and said subcontractors to cheat, defraud and swindle the construction company; and it was the deliberate intent and purpose of this publication to convey this impression and belief to the public (and it was so received and understood by those who read the publication), that the plaintiff had colluded and combined with the brick company and its subcontractors, and the subordinate engineers of the construction company, to cheat, swindle and defraud the construction company, and thereby injure the plaintiff's reputation and bring his name and character into disrepute, making his reputa-

tion odious and exposing him to the hatred, contempt and ridicule of the public at large.

Taking all these allegations together, we think they are sufficient to authorize the plaintiff to submit the question to a jury. It is claimed, however, by the able counsel for the defendant in error, that if the publication was libellous, it had reference to a particular class of people, and therefore gave no right of action to an individual of that class. Odgers in his work on Libel and Slander, \*p. 127, says: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. . . . Though the words used may at first sight appear only to apply to a class of individuals, and not to be specially defamatory of any particular member of that class, still an action may be maintained by any one individual of that class who can satisfy the jury that the words referred especially to himself. The words must be capable of bearing such special application, or the judge should stop the case. And there must be an averment in the statement of claim that the words were spoken of the plaintiff. The plaintiff may also aver extraneous facts, if any, showing that he was the person expressly referred to." While at first sight the words contended to be libellous in this case may appear to apply only to the subordinate engineers as a class, and not to be specially defamatory of any particular one of them, still if this plaintiff can satisfy the jury that the words referred especially to him, under this rule he would be authorized to maintain the action. He avers in the declaration that they were spoken of and concerning him, and he avers extraneous facts to show that they referred to him; he alleges that during the controversy with the brick company, the defendant ordered that section of the railroad which the plaintiff had surveyed and classified to be

re-surveyed and re-classified, and that whilst this was being done the words complained of were written and published, and that this caused people who read the publication to believe it was intended for him. The author above quoted from also says (\*p. 130), "If the application to a particular individual can be generally perceived, the publication is a libel on him, however general its language may be." In the case of *Wakley v. Healey*, 7 C. B. 591, the words complained of were: "We would exhort the medical officers to avoid the traps set for them by desperate adventurers (innuendo, thereby meaning the plaintiff among others), who, participating in their efforts, would inevitably cover them with ridicule and disrepute." The jury found that the words were intended to apply to the plaintiff, and he had judgment. In the case of *LeFanu v. Malcomson*, 1 House of Lords Cases, 637, the words complained of were contained in a newspaper article which imputed that "in some of the Irish factories" cruelties were practiced upon the workpeople; (innuendo, "In the factory of the plaintiffs," who were manufacturers.) The jury were satisfied that the newspaper was referring especially to the plaintiffs' factory, and found a verdict for the plaintiffs, and the House of Lords held the declaration good. Where the words complained of were, "There is strong reason for believing that a considerable sum of money was transferred by power of attorney obtained by undue influence," an innuendo, "Meaning as a fact that the plaintiff had by undue influence procured the money to be transferred," was held not too wide; for such would be the meaning conveyed to readers by the defendant's insinuations. *Turner v. Meryweather*, 7 C. B. 251. See also 13 Am. & Eng. Enc. L. 391; Newell on Slander and Libel, 257 *et seq.*; and note to Townshend on Slander and Libel, 115. Moreover, the words used in this case apply, not to a class, but to a particular group of that class; the difference

being as in saying of a class "all lawyers are thieves," and of a group, all lawyers engaged in a particular case, or some of them, are thieves.

It was claimed by counsel for the defendant in error that the action would not lie because there was no charge of any specific crime, act of dishonesty or improper conduct made against the plaintiff, and that the language used was not libellous of the plaintiff; that it was general, indefinite and disjunctive, and made no positive charge against him. But in actions of this kind it is not necessary that a specific crime should be charged, in order for the plaintiff to maintain his action. The plaintiff claims that it was a charge concerning his business and profession, tending to his injury; and our code says, speaking of oral defamation, that "charges made on another in reference to his trade, office or profession, calculated to injure him therein," are actionable, and that no special damage is essential to support the action. Code, §2977. If this be true as to mere slander, much more is it true as to written defamation. Code, §2974. We think, if the words were written of and concerning the plaintiff, they did accuse him of an offence amounting at least to moral turpitude, that he colluded with the brick company against his employer, and charged the latter \$100,000 or \$150,000 more than was due.

Nor does it make any difference that the words were put in the disjunctive, to wit, "the sub-engineers, or some of them." It may turn out on the trial that the expression "or some of them" was used because the writer did not mean that all were guilty, but that the plaintiff, alone or with others, was guilty. The plaintiff would be equally aggrieved if charged alone, or as one of a number of engineers, and equally entitled to maintain his action.

For these reasons we reverse the judgment of the court below.

*Judgment reversed.*

## GARTNER v. HAND &amp; COMPANY.

The matter alleged in the declaration was sufficient in law to entitle the plaintiff to maintain his action, the letters and cablegrams showing a complete contract.

January 19, 1891. By two Justices.

Contracts. Before Judge MADDOX. Floyd superior court. March term, 1890.

Reported in the decision.

WRIGHT, MEYERHARDT & WRIGHT, by brief, for plaintiff.

C. ROWELL, for defendants.

SIMMONS, Justice.

It appears from the record that Hand & Co. wrote the following letter to Gartner:

“Rome, Ga., ———, 188—.

“Carl Gartner, Hamburg, Germany:

“Sir:—We can furnish a considerable quantity of oak, white and red, of good quality, 2, 3, 4 and 5 inches thick, 10 to 24 inches wide, 12, 14 and 16 inches long. If you are situated so that you can handle this lumber, we shall be glad to hear from you as to quantity you can handle and price you can pay for the same.”

Gartner replied as follows:

“Hamburg, 16th Nov., 1886.

“Messrs. F. C. Hand & Co., Rome, Ga., U. S. A.:

“Dear Sirs:—I duly received your favor without date, and now beg to submit you the following trial order, viz: 2 car-loads oak planks, wagon stuff [describing], price \$40 per thousand feet, board measure, delivered Rotterdam, less my commission 5 per cent.; terms cash on arrival of the wood at Rotterdam, less 2½ per cent, or three months acceptance, your option. Please cable me on receipt of this your acceptance of this order or best possible counter offer. Shipment to be effected promptly. [Further description of the timber.] Awaiting your early cable, I am,” etc.

“P. S.—Can you deliver oak floorings as per specifi-

cation enclosed? Then please cable your cheapest price." [Then follows specification of marks and quantities of oak boards. The specifications are for six car-loads of flooring and two car-loads of wagon stuff.]

To this letter Hand & Co. replied by cable as follows:

"Rome, Dec. 16th, 1886.

"Gartner, Hamburg:—Wagon stuff forty-two dollars, flooring forty-one."

Gartner replied by cable as follows:

"Hamburg, Dec. 17th, 1886.

"Hand & Co., Rome, Ga.: Accept wagon stuff, floorings, your prices, my conditions. Immediate shipment, cable confirmation."

Hand & Co. replied by cable as follows:

"Rome, Ga., Dec. 18th, 1886.

"Gartner, Hamburg: Shipment begins next week."

It appears from the record that for some reason not stated, Hand & Co. refused to ship the timber to Gartner. Whereupon Gartner filed a suit against them alleging breach of contract, and setting out in his declaration the above correspondence, and in addition thereto a letter from him to Hand & Co. dated December 17th, 1886, wherein he recites the correspondence by cable, and states his acceptance of the timber, and asks whether they will undertake to deliver regularly other kinds of timber, etc. A letter from Hand & Co. to Gartner is dated December 18th, 1886, the same day as their telegram in which they state that the shipment begins next week. This letter recites the correspondence by cablegram, and says:

"You will please understand that this order refers to the two car-loads of wagon stuff without too large knots, and to cars of flooring marked 'K,' 'R,' and 'S.'"

And the letter then adds:

"We can also fill order for balance of the cars of flooring in 30 to 40 days, but price will be a little higher."



When the case came on for trial, it was dismissed by the court on demurrer, on the ground that the matters set forth in the declaration are not sufficient to enable the plaintiff to maintain his action against the defendants; and to this ruling the plaintiff excepted.

We think the court erred in sustaining the demurrer to this declaration. It was argued by counsel for the defendants that the correspondence set out in the declaration clearly shows that there was no contract made between the parties; that their minds did not assent to the same thing; and for that reason the judgment sustaining the demurrer was not erroneous. We cannot take this view of it. It seems to us that there was a clear and distinct agreement between these parties, one to sell and the other to purchase a certain quantity of timber. Hand & Co. wrote to Gartner informing him that they had certain wagon stuff for sale, and asking if he could handle it. Gartner replied that he would take two car-loads of wagon stuff, and inquired if they could furnish oak boards for flooring (for which specifications were given), and if so, to cable him, and give prices. In reply they cabled the prices for the wagon stuff and the flooring, of course meaning the flooring the specifications of which he had sent them. Gartner replied accepting the price and asking immediate shipment, and they replied that the shipment would begin next week. Here then was an agreement between the parties as to the thing to be sold, its quantity and quality, and the price; and according to this correspondence, the minds of both parties must necessarily have assented to the same thing. It seems to us as clear and clean-cut a contract as could possibly have been made. But it is argued that when Gartner's last letter arrived, it contained specifications of much more timber than he had ordered in his first letter, and that this shows that their minds did not assent to the same

quantity and quality. We do not think the specification as to additional timber makes any difference as to the contract they had actually agreed upon. They had agreed upon the shipment of six car-loads of flooring and two car-loads of wagon-stuff, and upon the price and quality thereof; and if Gartner subsequently ordered more at the same price and of a different quality, the defendants were not obliged to fill the latter order; they were only bound to fill the order to which they had agreed, to wit, the order contained in the letter of December 16th, 1886.

It was also contended by counsel for the defendants in error that the letter of Hand & Co. to Gartner, dated December 18th, 1886, explanatory of their telegram of the same day, shows that the parties had not agreed upon the same thing. That letter states, in substance, that they only meant to fill the order as to two car-loads of wagon stuff and three car-loads of flooring. We do not think this letter can be taken into consideration in determining whether or not the parties had made a contract; for before this letter was written Gartner had accepted the offer of the defendants by cable, and they had cabled him in reply that they would begin the shipment next week. When the last cable reply was sent, the contract was complete, and they could not change it by a letter written the same day and forwarded to Germany by mail. It is quite likely that before the letter left the post-office at Rome, Georgia, Gartner had received their cablegram in Hamburg, and upon the strength of that cablegram made the contract with other persons in Hamburg for the sale of this timber, which he alleges in his declaration he had made, and for a breach of which, caused by the non-delivery of this timber by Hand & Co., he had been sued and a recovery had against him. *Judgment reversed.*

BELL *v.* HUTCHINGS *et al.*

1. Upon the trial of a suit in equity to rescind a sale of land, where specific questions of fact were submitted to the jury, it was improper practice for the court to submit also, over objection of counsel, the question of whether the sale should be rescinded or not, that being for the court to decide upon the special facts found by the jury in answer to the other questions submitted. But inasmuch as the facts thus found by the jury are sufficient to authorize the decree made by the court, the judgment will not be reversed on this ground.
2. Polling the jury as to their verdict in a civil case is a matter of discretion with the trial judge which this court will not undertake to control; and he may grant a motion to poll them upon their answer to a specific question, as well as upon the whole verdict, but his refusal to do so is not ground for reversal.
3. Under the contract of sale, the plaintiffs were to be paid for the land partly in money and partly in other land to be conveyed to them by the defendant. The jury, in answer to questions submitted, found that the defendant could not make a good title to the land he agreed to convey, and could not fully compensate the plaintiffs for the loss of the land; that at the time of contracting no valuation was placed upon the plaintiffs' land; and that the conduct of the defendant constituted a fraud upon the plaintiffs. *Held*, that the decree for rescission was proper.
- (a) An offer by the defendant to convey other lands of the same kind as those he had agreed to convey was not a compliance with his contract.
4. In addition to the parts of the record specified by the plaintiff in error in his bill of exceptions as material to a clear understanding of the errors complained of, certain portions of the evidence were sent up on the petition of the defendants in error. It appearing to this court that this evidence is superfluous and immaterial, it is directed that the cost of bringing it up be taxed against the defendants in error.

January 19, 1891. By two Justices.

Contracts. Rescission. Equity. Practice. Jury.  
Before Judge GOBER. Polk superior court. August term, 1890.

Mrs. Hutchings and Mrs. Camp by their petition alleged: In October, 1886, S. B. Bell bargained with them to purchase their farm in Polk county for \$12,000, to be paid as follows: \$5,000 cash on taking possession;

\$1,400 in twelve months with 8 per cent. interest; titles to eleven lots, specified by numbers, in the twelfth district of originally Appling county, containing 5,390 acres of well timbered land, these lots being valued in the purchase at \$5,000; and titles to fifteen acres of land in Florida, valued at \$600. Relying upon his good faith and ability to comply with the contract, they allowed him to take full possession of the farm about December 15, 1886. He failed to make the cash payment, postponing it from time to time upon various excuses, and has only paid \$1,800. Upon full investigation made for petitioners by their agent, A. A. Camp, of the title of Bell to the lots of land in originally Appling county, they are convinced that the titles are worthless and the deeds held by Bell conveying these lands are forged and fraudulent, and that he cannot make any titles thereto under which it would be safe for them to take possession. They are informed and believe that one Garmany holds the genuine titles to seven of the lots; they do not know who holds the title to the remaining four, but believe there are conflicting claims to them. When Bell was informed as to this matter by them, he promised to give them good titles, but he has failed to do so, and so far as they are informed and believe, is making no effort to do so. When they received convincing information that his titles were not good, they offered to modify the bargain, and in lieu of title to these lots to take from Bell his notes for \$5,000, the value placed upon the lots by him in the bargain, the notes to bear interest at 8 per cent. and payable at any time set by him within five years; but he rejected this proposition, still insisting that he would give them correct titles to these lots. He has failed to pay the \$5,000 cash agreed upon, and to make titles to the land in Florida, and to execute his note for the deferred payment; and they have not executed to him any deed or bond or other

obligation to convey the farm. He holds possession of the farm, is running and cultivating it, and will appropriate to his own use the crops thereon. They believe that if he is solvent, he does not own sufficient property in Georgia to satisfy any judgment or decree they might obtain against him. They pray that the contract be rescinded; that they be put in possession of the farm; for judgment against him for damages because of his failure to comply with his contract, for receiver to take charge of the crops, and for general relief, etc. By amendment they alleged: The price fixed upon the plantation by them sold to defendant, was \$15,000, which they thought it was worth, and they were induced to sell it for \$12,000 because they were satisfied they could so manage the fine body of pine lands offered in the trade by Bell at \$5,000, as to make their plantation net them \$15,000 or more. The pine lands were heavily timbered, located close to the railroad, and the timber on them could have been sawed into lumber at a great profit, and by ordinary skill and energy they could have made more than the price fixed upon them by Bell in the trade. They would not have taken the \$5,000, at which these lands were valued, in cash, because they expected to make a greater sum out of the timber on them, and their getting the pine lands at the \$5,000 was the main inducement to make the trade, and without it the trade would not have been consummated. At the time it was made and throughout the negotiations, Bell represented to their agent that his titles to the pine lands were perfect; and when their agent asked to see the titles, Bell told him they were in the hands of his agent who lived in Florida; and neither petitioners nor their agent had any opportunity to examine the titles until after the trade was consummated, and they relied upon the representations of Bell that the titles were perfect, and did not know until

after he was put in possession of their plantation that his titles were not good. His representation that his titles to the pine lands were good, was fraudulent and false and so known to him, and his deeds were all, or nearly all, forgeries, the titles to seven of the lots being held by others; and he is not now attempting to defend his titles. He made these false and fraudulent representations with intent to deceive and cheat them; they were material to the consummation of the trade, were believed to be true by petitioners, and were acted on by them. They tender to him all sums that have been paid to them by him, and pray that he account to them for rents for their plantation from the 1st of January, 1887.

The defendant answered: In October, 1886, he had a conversation with A. A. Camp in reference to the purchase of the farm. Camp at first asked \$12,000, and defendant would not take it at this price. Camp then offered to take \$10,000 for it, and defendant did not agree to this proposition. He told Camp he would trade if Camp would take 5,390 acres of pine lands, and he then proposed to give Camp \$5,000 to be paid by the last of January, 1887; \$1,400 to be paid in the winter of 1889; fifteen acres of land in Florida at \$600; and the eleven lots of land in originally Appling, now Clinch and Echols counties, aggregating 5,390 acres. No price was fixed on this pine land, but he told Camp he did not know what it was worth. He did agree to take back the Florida land at \$600 within two years, should it not be worth that amount in that time; and he is still willing to do so. Camp then went to see the land, made a personal inspection of it, ascertaining that similar land adjoining and in the vicinity could be bought for \$100 a lot, so stated to defendant, and then accepted defendant's proposition. Up to January 12, 1887, he paid Camp for petitioners \$150, and on Janu-

ary 10, 1887, the additional sum of \$1,714.10. There was a mortgage of \$1,800 on the land given by petitioners, which they were to take up before he would pay over the \$5,000; and the final settlement was delayed by Camp in trying to hunt up and settle this mortgage. To facilitate matters, defendant finally agreed with Camp to carry the mortgage, if the mortgagee would allow it to be taken up within twelve months; the mortgagee agreed to this, and defendant then informed petitioners that he would carry the mortgage and asked that a day be set for a final settlement, which was done. When the time arrived petitioners declined to settle. They were not delayed by defendant, but he was ready at all times to pay the money, give a deed to the Florida land and the pine land, and give notes for the \$1,400. He has been advised and believes that his title to the pine lands, being a full and unbroken chain from the grantee down to him, is a true and genuine title. After Camp made the second visit to the pine lands, he stated to defendant that he had heard nothing affecting the titles. Defendant is ready to pay the \$5,000, less the amount paid and the amount of the mortgage and interest; he has already tendered to Camp his note for the \$1,400, due December 1, 1887, and deed to the Florida land in consideration of \$600, and a warranty deed to the pine land reciting a consideration of \$1,100, that being its market value, and in addition the balance of the \$5,000 less the mortgage and the amount paid; and he renews the tender. He is not insolvent; he sets forth various items of property owned by him in Georgia, and states that he owes no debts save the balance due on this land. Since he went on the farm he has made upon it valuable and permanent improvements to the extent of \$1,225, which he claims should be allowed him, besides interest, if he be required to account to petitioners for rent. He prays

that the court decree title in him to the land he bought from petitioners, upon his compliance with the contract, which he is now ready and prepared to do, or which he will do as soon as the terms of the contract can be settled by the verdict of the jury. Camp did not ask him for deeds, but only asked for an abstract, which he got; and he could have got deeds if he had asked for them. The price of \$15,000 was not fixed by petitioners upon the land, nor was any price fixed upon the pine lands which he contracted to sell them, but at the time of the trade both he, petitioners and their agent knew that these pine lands were not worth more than \$100 a lot, and that lands in large quantities of equal value in every respect and of equal accessibility in the same neighborhood, could be bought for \$100 per lot or less. It is not true that petitioners agreed to take \$12,000 instead of \$15,000 because they were satisfied they could manage the pine lands so as to make their plantation net them \$15,000 or more. They never expected to realize \$15,000 for their plantation by the trade. They have four of the eleven lots, and with \$700 can buy seven more in the immediate vicinity of the lots he agreed to sell them, as well timbered and as convenient to the railroad; and he now offers to furnish \$700, or such sum as may be necessary to purchase seven such lots, so that they may have eleven lots as good and valuable in every way as he agreed to sell them, or he offers to purchase and make titles to them to seven other lots lying near the lots above mentioned, with as good and valuable timber as the seven lots the title to which is disputed, and as near to the railroad as those lots; all of which he undertakes to do within — days from the decree, or within the same number of days from the time they will agree to accept it. It is not true that the petitioners would not have taken \$5,000 for the pine lands; they knew that with \$5,000 they



could have bought fifty such lots; these lands were not valued at \$5,000 in the trade, and petitioners getting them was not the main inducement, nor one of the main inducements to the trade, but the main inducement was to get money with which to pay debts, and which they did get. They had had their farm on the market, had offered it for \$10,000 cash, and had never made known that the getting of pine lands was a necessary part of any trade they would make, and no such information was furnished defendant in this trade. He never told Camp that the title-papers were in the hands of his agent in Florida; he had the title-papers in his possession and showed them all to Camp; and petitioners through their agent had the same opportunity to know whether or not defendant's titles were good as defendant had. He knew nothing of the validity or invalidity of the title, except through the title-papers and the assurance of the man he purchased from that the titles were good. If the titles were not good it was not known to him, and he had no reason to suppose that they were not good. He bought the lands in good faith and paid a valuable consideration therefor, and so far as he knows, his title to any of the lots was not disputed until after his trade with petitioners; and he supposed the papers were all genuine and not forged when he bought the lands and when he sold them to petitioners; the charges made by petitioners to the contrary are false; he made no attempt to deceive or cheat them, nor did he make any representations as to the titles, but all parties relied on the paper titles shown to and examined by Camp, and on the inquiries and information obtained by Camp on his visits to the lands. Defendant is willing and able to pay the money he undertook to pay, and to pay the value of all the lots to which his title has failed or is defective, or to pay the value of all the eleven lots to petitioners, or, if they

prefer, he is willing to procure and convey to them seven other lots, as above stated.

Following are the questions submitted to the jury, with their answers: "(1) Can S. B. Bell make a good title to the 5,390 acres of land in Clinch county and Echols county, mentioned in the pleadings? No. (2) Were, or not, said 5,390 acres land valued at \$5,000 in the trade which is sought to be set aside by complainants in this case? No. (3) How much was said 5,390 acres land worth October 15th, 1886? \$1,100. (4) Was, or not, said 5,390 acres land the principal or main inducement to complainants to enter into the trade? It was not. (5) Would, or not, the failure to get said 5,390 acres of land prevent complainants from the use and enjoyment to any material extent of the other part of the consideration they were to get under the trade? It would not. (6) Can complainants be fully compensated in money for the loss of said 5,390 acres land? We think not. (7) Did, or not, S. B. Bell practice any fraud on complainants in making the trade, or did he act in good faith? Fraud by failure of title. (8) Shall complainants take the fifteen acres land in Florida referred to in the trade, or shall Dr. Bell pay them \$600? Neither one. (9) How much money has S. B. Bell paid complainants in his purchase, and when was it paid? \$1,714.10, January 10, 1887; \$150.00, January 12, 1887. (10) What has the place bought by S. B. Bell from complainants been worth for rent for years 1887, 1888, 1889 and 1890? \$3,200. (11) What is the value of improvements put by Bell on said place since he took possession of it? \$1,409.00. (12) Was any value placed by the parties in the trade on complainants' farm, and if a value was placed upon said farm, what was that value? No value. (13) Shall said trade between complainants and S. B. Bell be rescinded? It shall. We,

the jury, make the answers to the above questions our verdict." The court thereupon decreed that the trade be rescinded as prayed for in the petition; that the plaintiffs be put into possession of the property claimed; that the defendant pay them \$3,200.00 for rent for 1887, 1888, 1889 and 1890, for which they should have execution; that they pay him \$1,409.00 for the improvements and \$1,864.10 for money paid them by him on the purchase of the land, with interest on the last named sum from January 10, 1887, at 7 per cent., to be deducted from the amount found due them as above stated; and that he have execution for any difference or excess in his favor, should there be any; and that the cost be taxed against him. For the grounds of error see the opinion.

BROYLES & SONS and F. A. IRWIN, for plaintiff in error.

BLANCE & NOYES, TURNER & GROSS and A. RICHARDSON, by brief, *contra*.

SIMMONS, Justice.

Mrs. Hutchings and another brought a suit on the equity side of the court to rescind a sale of land which she had made to Bell. After the evidence had been submitted, counsel for Bell presented eleven questions of fact which he asked the court to submit to the jury. Counsel for the plaintiff submitted two, one of which was, "Shall said trade between the complainants and Bell be rescinded?" To this question counsel for Bell objected on the ground that the answer thereto would be a matter of law, and that it was a question for the court after the finding of the jury on the other questions, and not a question for the jury. This objection was overruled. The jury returned a verdict answering the questions, which will be found in the official report; and counsel for Bell moved to poll the jury as to their answer to the last question. The court declined to poll the jury as to this particular answer, but polled them

on their verdict generally; and this was excepted to. The court then made a decree upon the finding of the jury, to which counsel for Bell objected on the ground that the facts found by the jury in answer to all the questions except the 13th, were in law inconsistent with the finding of the jury in answer to that question, and did not in law furnish cause for rescinding the contract. These are the three errors specified in the bill of exceptions filed by Bell.

1. We think it was improper practice for the court to submit the 13th question to the jury. Whether the trade should be rescinded or not was a question for the court to decide upon the other facts found by the jury. It would be useless generally to submit special questions of fact to the jury if the general question on the merits were submitted also at the same time. It is better to allow the jury to find as to special questions of fact without knowledge on their part as to the legal bearing of their findings. But in the present case, inasmuch as the special facts found by the jury in answer to the interrogatories propounded are sufficient to authorize the decree made in the case, we will not reverse the judgment on this ground.

2. There was no error in refusing to poll the jury upon any specific answer made by them to the questions propounded. The answers were not separate verdicts, but all the answers made one verdict. We do not mean to say that if the court in its discretion had seen fit to poll the jury as to any specific answers, it would have been error. Polling the jury, in a civil case, is a matter within the discretion of the trial judge, and he can grant a motion to poll them, either upon the whole verdict, or, for any sufficient reason, upon the answer to a specific question; and we will not undertake to control his discretion upon these matters of practice.

3. As to the 3d objection, we think the facts found

by the jury in answer to the questions other than the 13th were sufficient to authorize the judge to enter a decree of rescission of the contract, and we think the answers to those questions were not inconsistent with the finding of the jury in answer to the 13th question. We find from the pleadings in the case that Mrs. Hutchings contracted to sell Bell a plantation in Polk county, and that Bell agreed to pay her \$5,000 in cash, give his note for \$1,400 payable in twelve months, and convey to her 5,390 acres of land in Clinch and Echols counties, and 15 acres in Florida worth \$600. The jury found in answer to the questions propounded that Bell could not make a good title to the 5,390 acres in Clinch and Echols counties, and could not fully compensate her in money for the loss of this land; that he committed a fraud upon her in selling her the land when he could not make a good title to it, and that at the time of the contract no value was placed by the parties on Mrs. Hutchings' land. Taking all these facts together, we think the court was right in entering the decree for rescission. This was not a contract by Mrs. Hutchings for the sale of her land for money alone, but was a contract for its sale partly for money and partly for other land; and when the title to the land which Bell had agreed to convey her failed, it was a non-performance by Bell of his covenants with her to make her a good title to the Clinch and Echols land. She was entitled to have the land for which she had contracted, and Bell could not comply with his contract by offering her other lands of the same kind; and, as we have seen, the jury found that she could not be compensated in money for the loss of this particular land. (See Code, §2859.) For these reasons and others that might be mentioned, we affirm the judgment of the court below.

4. It appears from the record that the defendant in

error was not satisfied with the specifications of the record made by the plaintiff in error in the bill of exceptions, and petitioned the judge to have certain portions of the evidence sent up; which was accordingly done. In looking into the case we find that this evidence is entirely superfluous and immaterial, and is not necessary to a clear understanding of the case; and we therefore direct that the cost of bringing it here be taxed against the defendant in error; and if the plaintiff in error has paid it in the court below, that he have judgment therefor in that court.

*Judgment affirmed.*

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TATUM v. ZACHRY BROTHERS.

Debts due by customers to a blacksmith for work done by him in carrying on an independent business for himself as the proprietor of a blacksmith-shop, are not exempt from process of garnishment under the code, §3554, such indebtedness not being for the daily, weekly or monthly wages of a journeyman-mechanic or day-laborer within the meaning of that section.

January 19, 1891. By two Justices.

Garnishment. Laborers. Before Judge HARRIS. Troup county. At chambers, February 12, 1890.

Reported in the decision.

D. J. GAFFNEY, by brief, for plaintiff in error.

H. STRICKLAND, by T. H. WHITAKER, *contra*.

SIMMONS, Justice.

Under the facts in this case, it was not error in the court below to refuse to sanction the writ of *certiorari*. The evidence shows that Tatum was the proprietor of a blacksmith-shop, and not the employee of any one. His customers were garnished on accounts which they owed him, and he claimed that the accounts were exempt from garnishment because he was a day-laborer. While he may have been a day-laborer, he received no

wages as an employee, but was his own master; and our code (§3554) only exempts the daily, weekly or monthly wages of journeymen-mechanics and day-laborers. A person who carries on an independent business for himself does not come under this section.

*Judgment affirmed.*

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HILL *et al.* v. THE MACON & BIRMINGHAM RAILROAD Co.

Injunction. Practice.

SIMMONS, J.—It having been admitted by counsel for the plaintiffs that pending the writ of error, adjustment had taken place as to all matters alleged in the bill concerning the individual and private rights of the plaintiffs, leaving in controversy only their rights as citizens of the city of Greenville, and no abuse of discretion appearing, the matters still in controversy are left to be disposed of by final decree, there being as to them no such urgency as to require interlocutory interference.

January 19, 1891. By two Justices.

*Judgment affirmed.*

From Meriwether county. Before Judge HARRIS, at chambers, May 9, 1890.

J. M. TERRELL, H. W. HILL, G. L. PEAVY, A. H. FREEMAN, T. A. ATKINSON, J. R. TERRELL and W. S. HOWELL, for plaintiffs.

GUSTIN, GUERRY & HALL, F. M. LONGLEY and B. F. McLAUGHLIN, for defendants.

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THE HAGERSTOWN STEAM-ENGINE Co. v. GRIZZARD.

1. There being some evidence to authorize the verdict, and the trial judge being satisfied therewith, this court will not interfere with his discretion in refusing a new trial.
2. Where the general issue has been filed in due time, the defendant may amend by adding other pleas at any stage of the proceedings.
- 3, 4, 5. A ground of the motion for a new trial which is not approved by the court will not be considered. Nor will grounds which complain of the ruling out of interrogatories or the improper admission of evidence be considered where such interrogatories and evidence are not set out therein, or in the bill of exceptions.
6. The law does not require pleas in actions of tort to be sworn to.

January 19, 1891. By two Justices.

Pleadings. Practice. Verdict. Before Judge HARRIS.  
Campbell superior court. February term, 1890.

Reported in the decision.

GEORGE LATHAM, for plaintiff.

T. W. LATHAM and ROAN & GOLIGHTLY, for defendant.

SIMMONS, Justice.

The plaintiff in error brought suit in trover in the court below for a certain steam-engine, and elected on the trial to take a money verdict. The defendant filed several pleas; among which were the pleas of failure of consideration, set-off and recoupment. The jury found a verdict for the defendant, and the plaintiff made a motion for a new trial on several grounds, which was overruled by the court, and the plaintiff excepted.

1. The first three grounds are the usual ones that the verdict was contrary to the evidence, etc. There is some evidence to authorize the finding of the jury, and the court below being satisfied with it, we will not interfere with his discretion in refusing to grant a new trial on these grounds.

2. The 4th ground complains that the court erred in not striking the defendant's special pleas, on motion of the plaintiff's counsel, on the ground that the case had been pending two years and no plea of any kind had been filed "except answer," and that the plaintiff had notice from the defendant's counsel that he would defend on the ground that the engine was an old and second-hand one, but had no notice that a plea of failure of consideration or of set-off or recoupment would be filed, and had procured no testimony to meet these pleas. It appears from this ground of the motion for new trial that the court offered to continue the case in order for the plaintiff to procure testimony, but refused to strike the pleas.

We see no error in the court's refusal to strike the



pleas. The general issue had been filed; and under our practice, the defendant may amend his plea at any stage of the proceedings. But if he amends by setting up new matter or a new defence, the plaintiff may continue the case in order to procure testimony to meet the amendment; and the court may put terms upon the defendant.

3. The 5th ground was not approved by the court, and therefore cannot be considered.

4. The 6th ground complains that the court erred in ruling out the interrogatories of McGibony. These interrogatories are not embodied in this ground of the motion, nor in the bill of exceptions, and we therefore cannot determine whether they are admissible or not, as we do not know what the testimony was.

5. The same may be said of the 9th and 10th grounds of the motion. The catalogue referred to in the 9th ground is not set out, nor is the evidence claimed to be inadmissible in the 10th ground set out so that we can determine whether it is admissible or not.

6. The 8th ground complains that the plea of recoupment was not sworn to as required by law. The law does not require pleas in answer to actions of tort to be sworn to, and therefore there is no error in this ground.

*Judgment affirmed.*

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HOLLOWAY v. HOLLOWAY, executor.

1. The testator's widow and step-mother of his minor children, undertaking after his death to keep together and to care for and support the minors, became the head of his family, and as such was entitled to a homestead in his realty for the benefit of herself and the minors.
2. Whether the homestead lasts for the life of the widow as against the children on the arrival of all of them at age, and whether they are entitled to a division of the property in accordance with the will, is not now for decision. As to creditors, it has been held that the homestead does not expire until the widow's death.

February 2, 1891. By two Justices.

Homestead. Parent and child. Before Judge BOYNTON Upson superior court. July term, 1890.

Reported in the decision.

B. F. TISINGER and HALL & HAMMOND, for plaintiff in error.

J. A. COTTEN and A. M. SPEER, *contra*

SIMMONS, Justice.

It appears from the record in this case that R. S. Holloway died testate in 1869, leaving an estate consisting of land and personalty, a widow and nine children, five of whom were minors. The will provided that the property of the testator should be kept together until his youngest child should come of age, when there should be a division in kind, or a sale for division, share and share alike, to his wife and children. The widow was his second wife and not the mother of the children. In 1874 the widow applied for, as the head of a family, and had set apart a homestead in a portion of the realty for the benefit of herself and the five minor children. The minor children having all arrived at age, the executor, J. J. Holloway, in 1886 filed his petition in equity, alleging therein the death of the testator, the setting apart of the homestead; charging that the homestead was void, on the ground that Mrs. Holloway, not being the mother of the minor children, was not the head of a family, and therefore had no right to have the homestead set apart for herself and the minor children; and praying for the appointment of a receiver to take charge of the land and the rents thereof, and hold it for the benefit of the estate, etc.

The widow testified that the estate was being wasted, there were debts against it and she took a homestead to secure a home for herself and the minor children, of whom she had the care and custody after the death of

her husoand until the homestead was set apart; she cared for and raised them, and did the best she could for them; the two minor boys left her before they were of age; she sent one of them to school as much as he would go, and gave the two younger girls a good education. It appears that none of the children are now living with her upon the homestead estate.

1. In this state of facts, the court charged the jury that, if the defendant was the widow of the testator and had the homestead set apart after his death, and was not the mother of the children named in the petition for homestead, the homestead was void, and she had no right as the head of such a family to take a homestead. This charge was excepted to and made the third ground of the motion for a new trial, which was made by the defendant and overruled by the court. Under the facts of this case, we think the court erred in this charge to the jury. While there was no legal obligation on the part of this widow to support the minor children of her husband, yet we think that, inas-much as she undertook to keep them together, and to care for and support them, as the evidence shows she did, they all remained members of the testator's family, and she thereby became the head of that family, and under the laws of this State was entitled to a homestead as the head of a family. See *Capek v. Kropik*, 129 Ill. 509, s. c. 21 N. E. Rep. 836, where it was held that, on the death of his wife, a widower together with his minor *step-children* was entitled to a homestead in an entire lot of land which he had held in common with his wife. Moreover, when Mrs. Holloway took the minor children under her care and custody, she stood in the relation of a parent to them and took upon herself that obligation. She then was under a moral obligation to support and maintain these children, and the authorities hold that such a moral obligation is suffi-

cient to entitle her to have a homestead set apart for the benefit of herself and the minor children. *Wade v. Jones*, 20 Mo. 75; *Connaughton v. Sands*, 32 Wis. 387; *Greenwood v. Maddox*, 27 Ark. 648; *Arnold v. Waltz*, 53 Iowa, 706, s. c. 36 Am. Rep. 248; *Wilson v. Cochran*, 31 Tex. 677; *McMurray v. Shuck*, 6 Bush, 111; *Brooks v. Collins*, 11 Bush, 622; *Bell v. Keach*, 80 Ky. 42; *Riley v. Smith* (Ky.), 5 S. W. Rep. 869; *Moyer v. Drummond* (S. C.), 10 S. E. Rep. 952; *Chamberlain v. Brown* (S. C.), 11 *Id.* 439; 7 Amer. & Eng. Enc. Law, p. 804; *Thompson on Homesteads*, §45. And see *Marsh v. Lazenby*, 41 Ga. 153; *Blackwell v. Broughton*, 56 Ga. 390. To the effect that a step-father or step-mother may assume the relation of parent towards the step-children, see 2 Kent Com. 192; *Sanderlin v. Sanderlin*, 1 Swan, 445; *Williams v. Hutchinson*, 3 Comst. 312; *Murdock v. Murdock*, 7 Cal. 511; *Capek v. Kropik*, 129 Ill. 509, 21 N. E. Rep. 836.

Counsel for plaintiff in error relied upon the case of *Lathrop v. Soldiers L. & B. Ass'n*, 45 Ga. 483, which he claims to hold that "a widow is not the head of a family of minor children of a former husband by a former marriage." It is singular that both of the learned counsel for defendant in error, as well as the editor of the American & English Encyclopedia of Law (vol. 7, p. 804), fell into the same mistake. There was really no widow involved in that case. A glance at the facts of the case will show that Mrs. Lathrop was the wife of J. J. Lathrop, and that both husband and wife joined in the application for homestead out of the wife's estate. She had mortgaged her individual property to the loan association, and made an affidavit on the back of the mortgage that it was executed by her free will and consent, and that the mortgage money was to be used in payment of the price for the property. The money was loaned to her on the faith of

this sworn statement, and this court held that she was estopped from controverting the facts stated in her affidavit, and that to allow her to claim a homestead exemption "would be, to speak in the mildest terms, a legal fraud." The court also held that, as it was her separate property and she had no children of her own, she was under no legal or moral obligation to support the children of her husband by a former marriage, nor was she the head of a family of these minor children while he was in life. And this is all that the case rules. If her husband had been dead and she had taken the control and custody of his children, it would have presented a very different case from the one decided by the court.

2. Counsel in the case argued that, as all the children had come of age, the homestead estate had expired and the children were entitled to a division of the property in accordance with the will of their father. Whether this can be done or not we do not now decide, because the question is not properly made in the record before us. This court has held in several cases, where creditors were seeking to sell the homestead after the minors arrived at age, that it could not be done, because the homestead did not expire till the death of the widow. *Haslam v. Campbell*, 60 Ga. 650; *Groover v. Brown*, 69 Ga. 60. But, so far as we can ascertain, this court has never decided that the homestead lasted during the life of the widow as against the children on their arrival at age and when they sued for a division of the property. This question we will leave for future consideration, in case it arises hereafter in this suit or in another action, if the children or any of them should institute one.

*Judgment reversed.*

## ATWATER v. THE EQUITABLE MORTGAGE COMPANY.

SIMMONS, J.—The evidence was conflicting on all the material questions in this case. The chancellor having granted an injunction and appointed a receiver, did not abuse his discretion in so doing.

February 2, 1891. By two Justices.

*Judgment affirmed.*

Injunction and receiver. Before Judge MILLER. Crawford county. At chambers, July 5, 1890.

The petition of the Equitable Mortgage Company represented that Mrs. Atwater owed it \$2,150 principal, and \$123.63 interest, with interest on both of said sums at 8 per cent. per annum from December 1, 1889, and attorneys' fees, on a note dated December 15, 1888, which had become due, together with the interest because of failure to pay the interest first mentioned; that the note was secured by a deed to certain land which was valuable for its timber, and that Mrs. Atwater had undertaken to sell the timber to one Nash, who was insolvent and who was fast cutting off the timber and sawing it. The prayer was, for injunction to restrain her and Nash from cutting any more of the timber, and from removing any of that already cut; for a receiver to take charge of that already sawed, sell it and keep an account of it, and that the proceeds be applied to the debt; and for judgment for the amount due. The defence was, that the note and deed were executed on Sunday and therefore void; that the timber was cut for the purpose of clearing land, and defendant preferred selling it to burning it up; that the lands would be more valuable without the timber; that they were worth, with all the timber she expected to cut off, enough to be amply good for any decree that plaintiff might get; that defendant was solvent; and that the note was usurious.

W. C. WINSLOW and HARDEMAN & DAVIS, by brief, for plaintiff in error.

HALL & HAMMOND, *contra*.

## GREENWOOD v. THE BOYD &amp; BAXTER FURNITURE FACTORY.

1. To review the judgment of a justice's court for an amount exceeding fifty dollars, where no facts are in dispute, the writ of *certiorari* is a proper remedy.
2. Upon the hearing of a *certiorari* in the superior court, in which no issues of fact were involved, and the determination of the case depended entirely upon legal questions, it was the duty of that court to render a final judgment.
3. A power of attorney authorizing one to collect a fire insurance policy, payable to the assured, accompanied by oral instructions to apply the proceeds, when collected, to a debt due by the assured to the attorney in fact, does not operate as a transfer of such policy to the latter, or prevent the money due on such policy and still in the company's hands, from being reached by a garnishment sued out in favor of another creditor of the assured.

February 2, 1891.

*Certiorari.* Practice. Debtor and creditor. Garnishment. Title. Before Judge MILLER. Bibb superior court. November term, 1889.

On February 29, 1888, the plaintiff sued out an attachment against M. Greenwood for an indebtedness of \$81.74, and on March 1st the attachment was levied by service of a summons of garnishment upon certain insurance agents, who answered that the Fire Insurance Company of London, which they represented, owed M. Greenwood \$133.05 under the terms of a policy in said company and an adjustment made by the proper authorities, and that the amount would be due on March 22, 1888. A. Greenwood claimed the amount due upon the policy, and traversed the answer of the garnishees. The claim case was tried in a magistrate's court. The testimony showed that the plaintiff had obtained judgment against M. Greenwood in the attachment case; that on or about January 26, 1888, M. Greenwood owed claimant about \$250, and executed and delivered to him a power of attorney, authorizing him, "for me and in my name, place and stead, to collect and settle with the

Fire Insurance Association of London, for all and everything that may be done for my loss that I have sustained and insured in the above named association, . . . giving and granting unto my said attorney full and whole power and authority in and about the premises and generally to do and perform all and every act and acts, thing and things, device and devices in the law whatsoever needful and necessary to be done in and about the premises," etc. This power of attorney contained no provision as to what should be done with the money after it was collected. The claimant testified that when M. Greenwood turned over to him the policy of insurance, together with the power of attorney, he told claimant to collect the money found to be due on the policy by adjustment, and when he had so collected it, to apply it as far as it would go to the debt due to claimant. The fire by which M. Greenwood's stock of goods was injured occurred prior to January 26, and the insurance company had not paid over the money, although the loss had been adjusted at the time plaintiff sued out his attachment.

The plaintiff admitted that the facts as testified to by claimant's witnesses were true. The magistrate held that the power of attorney, together with the instructions given by defendant to claimant, was a valid transfer of the claim against the insurance company, and therefore the company was indebted to claimant and not to defendant in attachment. By *certiorari* the plaintiff alleged that the court erred in this ruling. In the superior court the claimant moved to dismiss the *certiorari*, upon the ground that the amount involved exceeded \$50, and there being questions of fact involved, the plaintiff's remedy was by appeal. The motion was overruled; and the court held that the magistrate erred in deciding as he did, and directed a final judgment in favor of the plaintiff. The claimant excepted.



A. PROUDFIT and DESSAU & BARTLETT, for plaintiff in error.

ROSS & ANDERSON, by brief, *contra*.

LUMPKIN, Justice.

1. Repeated adjudications of this court have settled the law as to when the judgment of justices' courts may be reviewed by *certiorari*. In all cases, where only questions of law are to be determined by the superior court, the remedy may be by that writ. Where facts are in dispute, there should be an appeal, either to a jury in the justice's court, or to the superior court. In the case at bar, there was a contest in the justice's court between the plaintiff in attachment and the claimant, as to which was entitled to the proceeds of a fire insurance policy, issued to the defendant in attachment. After all the testimony had been introduced, the plaintiffs admitted as true all that claimant's witnesses had sworn, and made no issue at all on the facts. Their position taken in the justice's court, as the record shows, was, that conceding all the claimant proved, they were entitled to their money. The justice adjudged otherwise, and the amount of plaintiffs' demand being over \$50.00, they sued out a writ of *certiorari* to the superior court. The judge below rightly refused to dismiss the same. There was no office for a jury to perform in this case, there being no controversy whatever as to the facts.

In determining whether or not a *certiorari* will lie in cases which are to go up from justices' courts, the test question should be: is there any disputed question of fact to be settled by a jury? If so, then there should be an appeal, but as WARNER, C. J., said in 53 Ga. 570: "If the only question involved is a question of law, which must necessarily control the case, then the proper remedy is by *certiorari*." In the case now under consideration, the only question was: taking all the facts, just as they appear, and without any controversy cou-

cerning them, are the plaintiffs, as a matter of law, entitled to have their claim paid out of this fund? Hence, there was no issue for a jury to try, "which the right of appeal presupposes." 69 *Ga.* 745. The ruling of the court below is fully sustained by the case of *Cruse v. Express Co.*, 72 *Ga.* 184, where it was held that when "no facts were contested before the justice, and the exception is that, conceding all the facts, the judgment was erroneous, a *certiorari* may be taken directly from such judgment." See also 70 *Ga.* 723, and 79 *Ga.* 680. A number of other decisions, bearing more or less directly on this question, have been rendered by this court. The rule, we think, to be deduced from them all is that *certiorari* will lie to review pure questions of law, that is, in all cases where there is no dispute as to the facts, or the inferences of fact to be drawn from the testimony; but when there are such disputes, of either kind, there must be an appeal.

2. The only controversy in this case being upon questions of law, and there being but one possible legal end of such controversy, the court did right in making a final judgment.

3. The policy of insurance could not be transferred by mere delivery, or by a written power simply to collect, with oral directions as to the application of its proceeds. 63 *Ga.* 681. *Judgment affirmed.*

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THE GEORGIA RAILROAD AND BANKING COMPANY *v.* THE  
MAYOR AND COUNCIL OF THE CITY OF MACON.

1. Where the State makes a grant of land to a city, to be absolute upon the payment of \$10,000 by the city to the State, within a given time, the original receipt of the comptroller-general, for said sum of money, was properly admitted as evidence of such payment.
2. Where land was granted to a railroad company, so long as the same should be used "for shops, depots and other conveniences

86	585
126	209

and fixtures necessary for said company," and the only use made of the land was the building and ~~maintenance~~ thereon of a track, or tracks, for the purpose of conveying freights to private parties, the storage of cars, and other like uses, this would not be a compliance by the company with the terms of the grant.

3. Where such a grant was made to the Milledgeville Railroad Company, of which the Macon & Augusta Railroad Company was the legal successor, and the latter company took possession of a portion of the land and so built and used such tracks thereon, but did no more, and the Georgia Railroad & Banking Company afterwards took possession of the same, and it appearing that the title was in the City of Macon, except so far as it might be affected by the terms of such grant, then the city was entitled to recover the land from the Georgia railroad as a mere wrong-doer, unless it showed some right to hold under the Macon & Augusta company; or, if it did show such right, then the city was entitled to recover for want of compliance with the terms of the grant, and in either event, no demand was necessary as a condition precedent to the city's bringing its action for the land.
4. Where the facts were as stated in last head-note, and a verdict in favor of the city was inevitable, a charge by the court on the law of prescription was immaterial and harmless.

February 2, 1891.

Ejectment. Evidence. Payment. Title. Grants.  
Demand. Charge of court. Before Judge MILLER.  
Bibb superior court. April term, 1890.

Reported in the decision.

HARDEMAN, DAVIS & TURNER, for plaintiff in error.

C. L. BARTLETT, R. W. PATTERSON and HILL & HARRIS,  
*contra*.

LUMPKIN, Justice.

This case is, in many respects, similar to that of *The Mayor & Council of Macon v. The East Tenn., Va. & Ga. Ry. Co.*, reported in 82 Ga., beginning on page 501. Most of the questions determined in that case are conclusive upon the questions at issue in this. The right of the old Milledgeville Railroad Company to ten acres of land, constituting a part of what was known as the "Macon Reserve," depended upon identically the same acts of the legislature, and the same action by the City

Council of Macon, as did the right of the Macon & Brunswick Railroad Company to ten other acres of land in such reserve. In that case, the East Tennessee company claimed to be the successor of the Macon & Brunswick company. In this case, the Georgia Railroad Company claims to be the successor of the Macon & Augusta company, which succeeded the Milledgeville company.

1. There was no error in the admission of the comptroller-general's receipt. The act of the legislature required the payment to be made to the State of Georgia. Its treasurer was the proper person to receive the money, and payments to the treasurer are legally evidenced by the receipt of the comptroller-general. In point of fact, the receipt now in question was actually signed by both the treasurer and the comptroller-general. A certified transcript from the treasurer's books, showing that this sum of money had been paid into the treasury, would have been admissible, in case no better evidence was attainable, to prove this payment; but the original receipt itself, conceded to be genuine, seems to us to have been evidence of the highest character of the fact of payment. See *Wooten v. Nall*, 18 *Ga.* 609.

2. In the argument of the case here, counsel for the Georgia railroad insisted on its right to hold so much of the land as is covered by the tracks thereon, and abandoned all claim to the remainder of said land. The question as to its right to hold any of the land has been settled by the court in the case cited. In his carefully prepared opinion, delivered in that case, BLECKLEY, C. J., stated, in effect, that it could not be supposed the authorities of Macon intended its grant as a donation, or gratuity, to the railroad company, but, beyond all doubt, the city expected to receive local benefits from the compliance by the company with the

terms of the grant, and it is clear that something more was contemplated than the building of railroad tracks across the land. A full examination of that case will show that the identical question now being considered was there adjudicated, and further comment upon it is therefore unnecessary.

3. It seems to have been conceded in this case, or, at any rate, no serious question was raised thereon, that the Macon & Augusta Railroad Company had succeeded to all the rights and franchises of the Milledgeville Railroad Company, but it is by no means clear how the Georgia Railroad Company became the owner, if it ever did, of the property and franchises of the Macon & Augusta company. It appears from the evidence that the Georgia company, under some sort of a contract, took possession of the Macon & Augusta railroad and operated it, but the record is entirely silent as to the nature of that contract, as to whether it was in writing or in parol, and as to what legal rights, if any, it conferred upon the Georgia Railroad Company. This being true, and the City of Macon having shown a clear legal title to the property in dispute, except in so far as that title might be modified or affected by the grant to the old Milledgeville company, clearly the city had a right to recover the property in dispute from the Georgia company, as a mere trespasser, unless that company showed, in some legal way, it had succeeded to the rights of its predecessors under such grant. But even if this had been shown by the Georgia company, it would have been of no avail, because it would then have been in no better position than its predecessors, and neither of them, as has been shown, could have held this land against the city, under the facts disclosed by the record. If any of these railroads had any right to the lands mentioned, it was by reason of accepting the grant on the terms fixed by the City

Council of Macon, and, as was held in the case cited, this must have been with the limitation that the estate acquired was to exist only so long as the property was used for the purposes specified, and such a limitation is different from an ordinary condition subsequent, inasmuch as it marks the limit, or boundary, beyond which the estate conveyed could not continue to exist. Numerous authorities are there cited in support of this proposition. Under our law, no demand is necessary, as a condition precedent to the bringing of an action, except in such cases as the law distinctly declares such demand shall be made. As far as we have been able to ascertain, this case does not come within any of such exceptions, and, therefore, no demand was necessary before bringing the action. The city's right of entry was complete, and therefore the action itself was all the demand the law required. *Edmondson v. Leach*, 56 Ga. 461.

There are numerous assignments of error in the bill of exceptions, but all of them which we deem material have been fully covered by the rulings in the case cited, and those herein made. After a careful examination of the record, we find that no errors were committed by the presiding judge. The case was fairly submitted to the jury, every right of the defendant was carefully guarded, and, in view of the facts disclosed by the record, we are satisfied that substantial justice has been done, more especially as the defendant has been relieved from the payment of all rents during the entire time it controlled and held possession of the property in dispute. We therefore affirm the judgment of the court below.

*Judgment affirmed.*

86	590
87	397
86	590
92	370

**FREEMAN v. COLEMAN, RAY & COMPANY.**

While a married woman may not contract a debt of suretyship that will bind her, she may, as an original undertaker, become liable for goods furnished to another from which she derives no personal benefit.

February 2, 1891.

Married women. Principal and surety. Before Judge MILLER. Bibb superior court. April term, 1890.

Reported in the decision.

A. PROUDFIT and DESSAU & BARTLETT, for plaintiff.

R. V. HARDEMAN and HARDEMAN, DAVIS & TURNER, for defendants.

LUMPKIN, Justice.

By an equitable petition Mrs. Freeman sought to set aside and cancel a mortgage and certain notes and a draft which she had given to Coleman, Ray & Co., on the ground that she was a married woman at the time of the execution of these papers and signed them merely as surety or guarantor for her sister, Mrs. Moughon. By their answer, the defendants alleged that Mrs. Freeman did not contract as surety or guarantor for her sister, but as an original undertaker, to whom alone they extended the credit. It appears from the record that Mrs. Moughon obtained the benefit of the goods furnished by the defendants. The issue submitted to the jury was whether credit was extended to Mrs. Moughon as principal and Mrs. Freeman as her surety, or to Mrs. Freeman alone. Upon this issue the evidence was decidedly conflicting, but the jury found in favor of the defendants, and this court will not disturb their finding. It is too well settled, both by our statute and repeated adjudications, to require further discussion, that a married woman cannot be bound by a contract of suretyship, but it may now be considered as settled

that she may, upon her own responsibility, purchase goods for the benefit of another and execute notes and mortgages to secure the same; and when she does this, she is bound by her contract. *Judgment affirmed.*

BURNS *et al.* v. LEWIS.

1. Where in a suit for divorce the verdict of the second jury finds in favor of a total divorce and expressly disallows anything for alimony to the wife, the husband's property embraced in the schedule filed with the divorce proceedings remains his property just as though the jury had disposed of it by awarding it to him. And this is true whether any judgment or decree has been entered up on the verdict or not.
2. By the constitution of 1888, in suits for divorce the function of regulating the rights and disabilities of the parties devolved on the jury rendering the final verdict, subject only to a power of revision by the court. A final verdict in favor of a total divorce was sufficient to dissolve the marriage, though it was silent as to rights and disabilities, and though no judgment declaring the marriage dissolved was actually entered up, the verdict, so far as appears, not having been set aside or interfered with by the court.
3. On the dissolution of a marriage by total divorce, the wife ceases to be a member of the husband's family as effectually as if she were dead. She is therefore no longer a beneficiary of a homestead set apart in his property. Her right to use or enjoy the property as a homestead terminates with the expiration of the coverture.
4. Where a creditor seeks to charge homestead property as such, the proceedings must conform substantially to remedies enforceable against trust estates. A trust estate is not subject to attachment on the ground that the trustee is a non-resident of the State; nor is an alleged homestead subject to attachment as such on the ground that the owner is a non-resident. In this case there was no debt other than one contracted by a former beneficiary after the homestead had determined. The judgment founded on an attachment for such a debt was void on the face of the proceedings, and a sale under it passed no title.
5. One in possession of real estate under color of title and claim of right, is subject to be assessed for the taxes accruing thereon pending such possession, and if such person allows the premises to be assessed and sold for taxes as the property of a former occupant who has neither title nor possession, such sale being made under a general *fi. fa. in personam*, not specifying any particular property

86	591
89	309
86	591
d97	797
86	591
98	569
86	591
118	280
86	591
120	119
e120	234
86	591
e125	842
86	591
130	719
130	871



to be seized, he cannot strengthen his title by purchasing at such sale, or from the purchaser at that sale. Any purchase so made by one subject to assessment will be treated as merely paying the taxes or redeeming the property.

- (a) Sundry observations on the proper mode of issuing tax *fi. fa.*, where the owner of realty assessed is unknown or doubtful.

February 7, 1891. By two Justices.

Marriage and divorce. Practice. Verdict. Husband and wife. Homestead. Debtor and creditor. Trusts. Attachments. Judgments. Taxation. Title. Before Judge MARSHALL J. CLARKE. Fulton superior court. March term, 1890

On September 15, 1874, Thomas Lewis brought complaint for land against Catherine Lewis; and on August 24, 1887, he filed his bill against Bridget Burns, Catherine Lewis *et al.*, praying for possession of the land in controversy to be restored to him, for cancellation of sheriff's and tax deeds to Bridget Burns, etc. The defendants answered; and by consent the two cases were consolidated and tried together. The jury found for the plaintiff the premises in dispute, and that the sheriff's and tax deeds be cancelled. The defendants moved for a new trial, which was denied, and they excepted. The decision states the facts necessary for an understanding of the rulings made.

F. A. ARNOLD and G. T. FRY, for plaintiffs in error.  
HILLYER & BROTHER and BROYLES & SON, *contra*.

BLECKLEY, Chief Justice.

A great many grounds are embraced in the motion for a new trial. Severally and collectively they raise the general question whether the court erred in overruling the motion. There are controlling elements of the case which will enable us to decide this general question without discussing separately the grounds of the motion in detail. The conclusion at which we have arrived is, that though errors were committed on

the trial, none of them were of such a character as to warrant the court below, or this court, in setting aside the verdict.

1. For the sake of clearness, we shall first consider the right of Lewis to recover in his complaint for land in the nature of ejectment against Mrs. Lewis, irrespective of the claim by Mrs. Burns. The premises in controversy consisted of a parcel of land fronting 103½ feet on Emma street and running back (same width) 185½ feet to D'Alvingy street, the same being lot No. 25 in the subdivision of the Loyd property, in the city of Atlanta, and containing a half-acre, more or less. The action was brought in September, 1874. Did Lewis, the plaintiff, have title and the right of possession at that time as against Mrs. Lewis, the defendant in the action? The lot was conveyed to Lewis in 1868 whilst these parties were husband and wife. On the 10th of April, 1869, she applied for it to be set aside as a homestead, reciting that the family of Lewis consisted of himself, herself and one child. The application also recited the deed by which Lewis acquired title, and stated that she applied for exemption of the property as a homestead because he failed and refused to do so. After regular proceedings by survey, plat, etc., the homestead was approved by the ordinary on the 26th of April, 1869. This was done pending a suit for divorce which had been brought by Mrs. Lewis against Lewis upon the same day on which her application for homestead was filed. The first verdict in the divorce suit was rendered at the April term, 1871. The date of the second verdict does not appear in the transcript of the record, but from divers facts it is manifest that the second verdict was rendered prior to the commencement of the action of complaint by Lewis against Mrs. Lewis for the recovery of the premises. Neither of the verdicts makes mention of any child or children,

and as there is no such reference elsewhere in the record other than in the application for homestead, the presumption is that the child, if any, had died before the parents were divorced. Should the fact be otherwise, the rights of the child under the homestead proceedings will not be affected by the result of this litigation. Its life or death may therefore be treated, and was treated below, as immaterial to a right disposition of the present controversy. This city lot was, by schedule, embraced in the pleadings in the divorce suit, and thus was before the court for disposition by the second jury. Code of 1868, §§1719, 1721, corresponding to Code of 1882, §§1720, 1722. The verdict of that jury granted a total divorce to both parties, and expressly declared that no alimony was to be set apart for the support of the wife. Otherwise, the verdict was silent as to property, but the fair implication is that the intent of the jury was that this lot, which was the only property specified in the schedule, was to be and remain the property of the husband. The verdict is to be understood as denying the wife any enjoyment of it after the marriage was dissolved, and as leaving the ownership in the husband. *Barclay v. Waring*, 58 Ga. 86. So far as appears, no judgment or decree of the court was rendered in the divorce suit, either declaring the marriage dissolved or making any disposition of the scheduled property. Doubtless the law contemplates that some judgment should be rendered. Indeed, the code is express, where the verdict disposes of property, that the court shall enter such judgment or decree, or take such other steps usual in chancery, as will effectually execute the verdict. Code of 1868, §1723; Code of 1882, §1724. But where the verdict denies alimony, and in effect leaves the property unchanged in ownership, no judgment or decree is essential to carry the verdict into effect, so far as property

rights are concerned. In the case above cited none such was rendered, and this court ruled that the divorce worked no change in the title.

2. After the rendition of two verdicts in favor of the divorce, was it indispensable that a judgment declaring the divorce granted should have been entered up in order for the marriage to be legally dissolved and Mrs. Lewis eliminated from the family of her husband? This might have been necessary had the proceeding been governed by the constitution of 1865, as was that in *Clark v. Cassidy*, 62 Ga. 408, 64 Ga. 662. Under that constitution it devolved upon the court to regulate the rights and disabilities of the parties. Irwin's Code, §4964. But by the constitution of 1868 this function was lodged with the jury rendering the final verdict, subject only to a power of revision by the court. Code of 1873, §5116. It was under this latter constitution that the divorce suit of Mrs. Lewis against her husband was begun and terminated. The final verdict being in favor of a total divorce, admits of no construction but that the jury intended the marriage should be dissolved, and we think the revising power of the court contemplated by the constitution of 1868 would not extend to this element of the verdict, but only to any special findings, had the verdict embraced any, touching the rights and disabilities of the parties. The verdict being silent as to the rights and disabilities of the parties, there was nothing over which the revising power of the court could be exercised. The only judgment which could have been rendered was one declaring a total divorce. This being so, we think the omission to enter up such a judgment was not matter of substance, and that the legal effect of the final verdict was to dissolve the marriage *ipso facto*. It may be added that Mrs. Lewis does not controvert the completeness or finality of the divorce. In her answer to

the bill filed by Lewis in connection with his original suit against her for the land she, by implication, admits that a decree was rendered in the divorce case, for she mentions a decree by name. As we find none, however, in the record, we dispose of the question independently of her answer.

3. The dissolution of the marriage severed Mrs. Lewis from the family and she was no longer a beneficiary of the homestead. By the constitution of 1868 her husband, as the head of a family, had the right to a homestead, of which the sole beneficiaries were the members of his family. Code of 1873, §5135. By statute she as his wife was empowered to have the homestead set apart if he failed or refused to do so. This right she exercised, but the fact that the property was set apart on her application would give her no better or more durable interest in the use of it than she would have had if it had been set apart on his application. The death of a wife where there are no surviving minor children, or the majority of children where there is no surviving wife or widow, terminates the homestead. *Heard v. Downer*, 47 Ga. 629; *Benedict v. Webb*, 57 Ga. 348. A total divorce severs the wife from the family as effectually as death itself. She ceases to be a beneficiary of the homestead provision, and her relation to it from thenceforth is the same as if she had never been a member of the family. The provision which the law contemplates for a divorced wife is alimony or such an interest in the property of the husband as the jury rendering the final verdict shall award to her. In this instance the jury thought proper to declare in express terms that no alimony was to be set apart for her support. We have already seen that the effect of this was to leave the title to the property now in question in Lewis. If her interest in it as a homestead was destroyed by the dissolution of the marriage, and the verdict conferred upon

her no new interest, she was left altogether without right to use or occupy the premises, and consequently, when Lewis brought his action against her in 1874, both the title and the right of possession were in him. As between him and her, therefore, his recovery in the court below was correct.

4. The next inquiry is as to the title set up by Mrs. Burns and the right of a recovery by Lewis as against her. Her title has two branches. First, she claims as purchaser at a sheriff's sale which she procured to be made under an attachment issued at her instance against Lewis in 1882. The attachment was issued in May, judgment upon it was rendered in the justice's court in July, and the property was sold by the sheriff in September, 1882. The ground alleged in the affidavit for attachment was that Lewis resided out of the State, and the petition filed in the justice's court by Mrs. Burns in support of her attachment alleged that Lewis was indebted to her in the sum of \$100.00, besides interest, on an account for money furnished, materials provided and labor done on his house and lot in the city of Atlanta (describing these premises); that the same had been exempted and set apart as a homestead, and that the money and materials furnished and labor done were all furnished and done for repairs on said homestead, at the instance of the beneficiaries of the homestead, and were all necessary for the protection and preservation of the property. The account bore date in January, 1879, and consisted of various items aggregating \$100.00, the items being lumber for improving and repairing house, railings for fences, digging post-holes, posts, well-bucket, pulley for well-bucket, windlass for well, well-house and brick wall in well, brick and labor for walks, one grate and setting same, nails, and two doors. This proceeding by attachment is susceptible of only one construction, which is that it

was an attempt to charge Lewis by attachment with expenses incurred by Mrs. Lewis in making repairs to the house and premises as homestead property long after the homestead terminated. The pleading shows on its face that, treated as a claim against Lewis, it was void, because the facts stated in the petition and bill of particulars would raise no debt against him personally. Treating the claim as one against the homestead property, the attachment was void, for homestead property is to be made liable for debts chargeable upon it in the same manner as ordinary trust estates are made liable. *Willingham v. Maynard*, 59 Ga. 330; *Wilder v. Frederick*, 67 Ga. 669. And a trust estate is not subject to attachment on account of the non-residence of the trustee. *Smith v. Riley*, 32 Ga. 556. The judgment founded upon this attachment was consequently void on its face, the proceedings from which it resulted showing that there was no cause of action otherwise than as a claim against the property in its homestead character, and such a claim being under the law a subject-matter for which the remedy of attachment is not available. The justice's court had no jurisdiction by attachment of the alleged cause of action and the judgment was one which it had no legal power to render. The sale made by the sheriff was therefore void, and Mrs. Burns acquired no title as against Lewis by her purchase at that sale.

5. The other branch of Mrs. Burns' title springs out of a sale for taxes. Speaking of the sheriff's sale made in September, 1882, she states in her answer that: "The sale was in every sense legal, open and fair. Under it defendant went into possession and has remained in it ever since." In September, 1883, an execution was issued in favor of the City of Atlanta against Catherine Lewis for \$6.00, "the amount of her city tax for the year 1883." This execution mentioned no specific

property, but directed generally the seizure of the goods and chattels, lands and tenements of Catherine Lewis. It was levied upon the premises now in controversy as her property. A sale took place in pursuance of this levy in November, 1883, at which the city was the purchaser, and a deed was made to the city accordingly, the purchase price recited being \$15.13, which was the amount of the tax *fi. fa.* together with the costs thereon and the expenses of sale. After retaining the title thus acquired for more than one year, the city, in January, 1885, offered the property for sale at public outcry and Mrs. Burns became the purchaser at the price of \$24.10. A deed to her was executed by the mayor of the city. This is her tax title. It appeared in evidence that, according to the returns of the city assessors, the premises were assessed for the tax of 1883 as the property of Mrs. Catherine Lewis, and had been so assessed each year consecutively for ten preceding years. It further appeared that the tax assessed on these premises for the year 1883 was \$6.00, and that Mrs. Lewis was not assessed upon any other property, so that if she was answerable to the city for any tax whatever, it was only on this particular property. It did not appear, however, that she was in possession of these premises at any time after the sheriff's sale in September, 1882. On the contrary, it appeared from the answer of Mrs. Burns that she, Mrs. Burns, was in possession when the taxes of 1883 accrued. Her answer further states that: "This defendant paid the State, county and city taxes for 1882 on the property. These taxes were then assessed against the property in the name of Catherine Lewis. In 1883, this defendant resided out of the city of Atlanta and had omitted to have the property transferred on the city tax books from the name of Mrs. Lewis to her own name." Mrs. Lewis being neither the owner nor in possession of the premises in 1883, was



not chargeable with the taxes of that year, nor does it appear that she returned the property for taxation, either as agent or otherwise, so as to render herself chargeable by reason of returning it. Indeed, the taxing system as to real estate, under the charter of Atlanta, does not contemplate private returns, but only assessment by the official assessors and the returns made by them, as the basis of taxation. Acts of 1874, pp. 124, 144. The official assessors are at liberty to return property as belonging to unknown owners, but not to ascribe ownership to any and every person indifferently. Doubtless they can treat as owner any person in possession when they are unable to fix ownership on any one else, for possession is a mark of ownership; but where there is no actual possession at the time the premises are examined and assessed, they should not return any owner as known if in fact he is unknown. If they do so, and if an execution issues for the taxes against a person who has neither possession nor any interest in the property, what authority is there for selling or seizing one parcel of property more than another unless the execution points it out? Can an execution *in personam* sell anything as to which the defendant neither has title nor any right to represent the person who has it? We should say not. In *Stokes v. The State*, 46 Ga. 412, the execution described the property as the "Bryan plantation," and the court said: "If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property." In *Williams v. Young*, 51 Ga. 453, the defendant in the tax *fi. fa.* was in possession, and the property had been returned by him in the character in which the *fi. fa.* charged him, namely, as agent of the

estate of a deceased owner. In *Hight v. Fleming*, 74 Ga. 592, it appeared that the defendant in the tax *fi. fa.* was the agent of the owner of the property taxed, and that the tax for which the *fi. fa.* issued was assessed upon the property from the sale of which the fund in court for distribution arose. The facts stated in the report would warrant the inference that the agent was in possession of the property when the tax accrued. In *The State v. Hancock*, 79 Ga. 799, the defendant in the tax *fi. fa.* was in possession with his family, to whom the property belonged, and he had returned it in his own name as owner. In *National Bank of Athens v. Danforth*, 80 Ga. 55, the defendant in the tax *fi. fa.* was in possession of the property, probably at first as agent for her son, the owner. The circumstances indicated that it had been returned by her or her agent for taxation for some years before she became interested in it in her own right. There were executions for three years' taxes, and the only doubtful matter was as to the taxes of the first year. The evidence warranted the conclusion that she had returned it, though informally, for taxation in each of the three years, and had a right so to do. None of these cases afford any warrant for selling property for taxes under a general *fi. fa.* against a person who is not the owner or occupant nor the agent of either, and who has not returned it for taxation. On the other hand, the case of *Clewis v. Hartman*, 71 Ga. 810, has a strong tendency to show that such a sale will pass no title. In that case the tax *fi. fa.* was issued against one person as agent for another. As such agent, the defendant had returned by number two lots of land for taxation. The *fi. fa.*, which was a general *fi. fa. in personam*, was levied upon a third lot not embraced in the return. It did not appear that either the agent or his principal was in possession of the lot levied upon during the year for which the tax

was assessed, nor did either of them return the lot for taxation. In that case, as in this, the *fi. fa.* did not show on its face that it was issued for taxes due on the land which was sold. A sale was made under the levy, and a deed was executed accordingly. It was held that the purchaser acquired no title. For general authorities on this question, most of which are affected by statutory provisions, see Cooley on Tax. 396; 1 Blackw. Tax Titles, §256 to §277. In this State, the universal rule, unless some statute can be shown to vary it in particular instances, is that taxes are to be charged upon the owners of property. Owners, therefore, have an interest in being properly designated in executions which issue for the collection of taxes upon their property, or if they cannot be designated with reasonable certainty, that the property shall be pointed out in the executions as authority for seizing it irrespective of ownership, or as the property of some particular person. In all cases of doubt, the execution should specify the particular realty on which the tax accrued, and direct the officer to seize it or so much of it as is necessary to pay its own taxes. This is especially true where the system of assessment, as in Atlanta, is by official assessors, and not by returns made to a tax-receiver. Under such a system, the executions issued for taxes on realty should be of a mixed nature, that is, each execution should be a process partly *in rem* and partly *in personam*. Of course, where the owner is wholly unknown, and is unrepresented by an occupant or agent, the execution would, from the necessity of the case, have to issue against the property only. The divorce suit was matter of public record in the superior court of Fulton county. So, too, was the result of the homestead proceedings. The two, read together, furnished notice that Mrs. Lewis ceased to have any interest in these premises when the divorce was granted. After

that time the city assessors had no warrant for treating Mrs. Lewis as owner save that she was in possession. So long as she remained in possession, they were justified, perhaps, in so treating her; but Mrs. Burns, not Mrs. Lewis, was in possession in 1883, under her purchase at the sheriff's sale made in September, 1882. What reason, then, was there for assessing the premises for the tax of 1883 as the property of Mrs. Lewis? And what propriety was there in levying upon the property and selling it as hers under a general *fi. fa.* against her? At a sale so made the city, a party to the wrong assessment, became the purchaser. Did it acquire any title whatever? We are strongly inclined to the opinion that it did not. But if it did, was not the subsequent purchase by Mrs. Burns from the city, although made after the year for redemption had expired, a redemption in substance and effect? She was in possession under claim and color of title when the tax of 1883 accrued. She was the sister of Mrs. Lewis, knew that Mrs. Lewis was neither the owner nor in possession, knew that the divorce had been granted, and she was chargeable with notice that the action in favor of Lewis for the recovery of possession was pending. She could not have been ignorant that the duty of paying the tax rested either upon herself or upon Lewis, and that the assessment to Mrs. Lewis was erroneous. As between her and Lewis, was it not her moral duty to pay the taxes for the year 1883? She obtained her color of title pending his action for possession, and by an unwarranted use of legal process in his absence from the State. She thus entered into possession and has been in possession ever since. On her theory of ownership, the taxes for 1883 were chargeable to her. If they were chargeable to her morally, she could not better her title by a direct purchase at the tax sale. *Douglas v. Dangerfield*, 10 Ohio, 152; *Lacey v. Davis*,

4 Mich. 140; Blackwood v. Van Vleit, 30 Mich. 118; McMinn v. Whelan, 27 Cal. 300; Barrett v. Amerein, 36 Cal. 322; Christy v. Fisher, 58 Cal. 256; Bassett v. Welch, 22 Wis. 175; Lybrand v. Haney, 31 Wis. 230; Gaskins v. Blake, 27 Miss. 675; Jacks v. Dyer, 31 Ark. 335; Black on Tax Titles, §146; 1 Blackwell on Tax Titles, §581; Cooley on Taxation, p. 500 *et seq.*; 2 Desty on Taxation, p. 934 *et seq.* See note to Blake v. Howe, 15 Am. Dec. 685 *et seq.* Nor could she strengthen her title by taking at second hand from the purchaser at that sale, the amount paid by her being inconsiderable as compared with the value of the property. Her purchase would count only as a redemption. Dubois v. Campau, 24 Mich. 360; Coppinger v. Rice, 33 Cal. 408; Whitney v. Gunderson, 31 Wis. 379; Keith v. Keith, 26 Kans. 26; Cowdry v. Cuthbert, 71 Iowa, 733; Wambole v. Foot, 2 Dak. 1, s. c. 2 N. W. Rep. 239. But let it be granted that Mrs. Burns might have acquired title had the property been assessed to Lewis, the owner, and sold as his, yet it would not follow that she could acquire a better title than the person had to whom it was assessed and as whose property it was sold. Her relation to the property and to Lewis, as owner, might not cut her off from purchasing his title had it in fact been sold, but Lewis was not the defendant in execution, nor was the execution against his property, but against the goods and chattels, lands and tenements of Mrs. Lewis. Under the special facts of the case, Mrs. Burns could not acquire the title of Lewis, because it was not sold; and as Mrs. Lewis had no title, Mrs. Burns took nothing by her purchase from the city. She and the city were alike affected by the want of title or possession in Mrs. Lewis when the taxes of 1883 accrued.

For the reasons which we have assigned, the case had a right result as to Mrs. Burns. and we have already

seen that there was a right of recovery against Mrs. Lewis. This being so, none of the assignments of error in the bill of exceptions can be sustained as cause for a new trial. The court was correct in denying the motion.

*Judgment affirmed.*

IRVIN *et al.* v. GREGORY *et al.*

1. A majority of the complainants having voted in favor of the approval of the local school law now in question, and all of them having acquiesced in the result of the election until after a school was established and put into operation, the judge was warranted in denying an interlocutory injunction to restrain the collection of a tax authorized by the local law and levied thereunder for supporting the public school system provided for by said law. Any infirmity in the law or in the election was as good cause for enjoining the establishment of the schools before the expense was incurred, as it would be now for arresting the collection of revenue with which to defray the expense.
2. The general rule is that provisions in a statute for advertising a proposed election are mandatory unless the time and place of such election are fixed by the legislature, yet where the advertisement prescribed was publication once a week for four weeks, and the last publication was inadvertently omitted but the other three were duly made, the omission may be treated as a mere irregularity, if more than two thirds of the qualified voters actually voted, and if the result has been acquiesced in until after action has been taken on the faith thereof by which substantial rights have arisen.
3. In a local statute authorizing the establishment of public schools in a town, a provision that the local board may admit pupils not residents of the town on such terms as the board may prescribe, is not to be construed as allowing the board to prescribe terms which would cast upon the town or its inhabitants any part of the expense of educating non-resident pupils. Such pupils cannot be received at a less rate per scholar than the inhabitants of the town pay by taxation for their children, nor can they be received at all to the exclusion of resident children who would otherwise attend.
4. In so far as municipal public schools perform the functions of common schools, they must be free to all the children of the municipality just as the common schools in general are free to all children of the State. This results from the scheme of the constitution in regard to public schools. It follows that the exaction of an incidental fee to be paid by each and every pupil as a con-

86	605
96	479
86	605
101	427
86	605
104	487
86	605
106	733
86	605
115	218
86	605
116	494
86	605
118	698
86	605
120	32
86	605
127	255
86	605
129	280
130	50

dition of admission into the public schools of a town, though constitutional as applied to non-resident pupils, would be unconstitutional if applied to resident pupils also.

5. The main purpose of a statute passed by the General Assembly and approved by two thirds of the qualified voters of a given town, being to establish and maintain a system of public schools in and for said town, an unconstitutional requirement therein which exacts an incidental fee annually of all pupils, thereby including resident as well as non-resident pupils, will not necessarily vitiate the whole statute. If, as matter of fact, the means otherwise provided for establishing and maintaining the schools are sufficient for the purpose, the law can have effect, notwithstanding the failure of the legislative and the popular intent touching the universality of the requirement for the payment of incidental fees.
6. Administrative acts on the part of the local board of education, even if erroneous or wrongful and amenable to proper remedial proceedings, furnish no cause for enjoining the collection of a school tax legally assessed.

February 7, 1891. By two Justices.

Injunction. Elections. Schools. Taxation. Statutes. Publication. Constitutional law. Before Judge FORT. Stewart county. At chambers, November 1, 1890.

Reported in the decision.

STEED & WIMBERLY, J. L. WIMBERLY and HARRISON & PEEPLES, for plaintiffs.

R. F. WATTS and LITTLE & WIMBISH, for defendants.

BLECKLEY, Chief Justice.

1. The election was held on the 19th day of July, 1890. This bill was filed on the 20th of October, 1890. In the meantime, the local board of education provided for by the act had gone to work, established and opened a school, and the school had been in actual operation for about six weeks before any steps were taken by the complainants to have the election declared illegal. More than half of them had voted in the election in favor of the school law, and all of them acquiesced in the result until after the school had been organized and put to work. This involved expense, and the complainants

stood by and permitted the expense to be incurred when full diligence on their part in making an application for injunction would have raised the question which they now seek to make in time to have put the question on its own merits, uncomplicated with the consequences of delay in making it. Under these circumstances the judge was warranted in denying a preliminary or interlocutory injunction on the application of these complainants, who sue, not in behalf of the citizens of the town generally, but for their own separate benefit and protection. If they have any good cause for enjoining the collection of the tax, that cause would have been equally good for enjoining the establishment and opening of the school at the expense of the town,—an expense which they must have known was incurred with the expectation that a tax would be imposed to defray it. In the view of a court of equity it would not be altogether conscientious for citizens of a town to acquiesce in the establishment of a public school system for the benefit of the town until that benefit had been secured, and then object to contribute their *pro rata* of taxation necessary to defray its expenses for the first year. Especially is this true of most of the complainants; for they not only acquiesced, but took an active part by their votes in causing a public school system to be adopted.

That the objection now urged against the tax might as well have been urged against the creation of the municipal obligation rendering the tax necessary, see *Hudson v. Marietta*, 64 Ga. 286; *County of Dougherty v. Boyt*, 71 Ga. 484; *Gavin v. City of Atlanta*, 86 Ga. 132, 12 S. E. Rep. 262; *Crampton v. Zabriskie*, 101 U. S. 601, 609; *Howell v. City of Peoria*, 90 Ill. 104; 1 Dillon Municip. Corp., 4 ed. §197 *et seq.*; Cooley Taxation, 764.

Of the thirteen complainants one is a woman, and



had no vote in the election, and another is a man who voted against the measure; but these two have linked their fortunes in this bill with the other complainants, seven of whom voted in favor of the approval of the local law authorizing the establishment of the school.

2. Perhaps what we have already said would be enough to dispose of the case in so far as the element of interlocutory injunction is concerned. But as we have held it up for a considerable time for the purpose of dealing with it in a broader and more comprehensive way, we shall express our opinion upon several of the points in controversy argued at the bar and on which a decision was invoked. Did the want of a strict compliance with the terms of the statute in advertising the election render the election void? The constitutional provision under which the act was passed reads as follows: "Authority may be granted to counties upon the recommendation of two grand juries, and to municipal corporations on the recommendation of the corporate authority, to establish and maintain public schools in their respective limits, by local taxation; but no such local laws shall take effect until the same shall have been submitted to a vote of the qualified voters in each county or municipal corporation, and approved by a two thirds vote of persons qualified to vote at such election; and the General Assembly may prescribe who shall vote on such question." Code, §5207.

The provision in the act of 1889 (pp. 1305-6), under which the election was held, reads thus: "This act shall be submitted to an election for approval or disapproval by the qualified voters of the town of Lumpkin; said election to take place on such day as the mayor and council may determine, notice of which election shall be given by the mayor of said town by publication in any newspaper published in the town of Lumpkin once a week for four weeks previous to the day of election.

Those favoring public schools shall have printed or written on their ballots 'For Public Schools,' and those opposing shall have printed or written on their ballots 'Against Public Schools.' That said election shall be held in the same manner as elections for mayor and council of the town of Lumpkin are held, and all those qualified to vote at an election of mayor and council of said town shall be permitted to vote at the election herein provided for. The managers of said election shall certify the number of votes cast 'For Public Schools' and 'Against Public Schools' to the mayor and council of said town of Lumpkin, and if two thirds of the qualified voters of said town shall vote 'For Public Schools' the mayor of said town shall so declare in writing, and publish his said declaration once in any newspaper published in said town, and upon said publication this act shall take effect and be of force, and the public schools therein provided for shall be put in operation as soon as deemed practicable by said board of education of the town of Lumpkin." The election was advertised in the proper newspaper for a period of four weeks before the day of election, but there was an omission, which seems to have been altogether casual and undesigned, to insert it in the issue of the last week of the four; that is, it was published once a week for three weeks, but in the fourth week it failed to appear. There was thus a literal departure from the requirement of the statute; for though notice was given four weeks, it was not given by publication once a week for four weeks, previous to the day of the election. When the time and place of an election are fixed by law, the requirement of notice is directory; but when they are not so fixed, and the duty of fixing them is committed to a municipal body, what the statute prescribes as to the giving of notice is mandatory. This is the general rule. Paine on Elections, §385; 1 Dill. Municip. Corp. §197; Cooley Const. Lim. 759; 6 Am. and Eng. Enc. L. 297 *et seq.*

The town of Lumpkin is not a large one and there is every probability that the election, although not advertised with strict regularity, was known to every inhabitant interested in the question except one, whose affidavit is in the record. More than two thirds of the qualified voters actually voted; and such was their unanimity in favor of the measure that only one vote was cast against it. The rule of our code, §4, ¶6, is that a substantial compliance with statutory requirements, especially on the part of public officers, will suffice. Where it affirmatively appears, as it does here, that the results of notice have been realized as to the great body of the voters, we feel warranted in concluding that the publication in this instance for four weeks, though there was an omission of one insertion, was a substantial compliance with the terms of the act. The purpose of the notice was to make generally known the time and place of election. This was as fully accomplished in the present case as it was in *Wheat v. Smith*, 50 Ark. 266, 7 S. W. Rep. 161. The law involved in that case required two modes of advertising the election, one of which was wholly omitted; nevertheless the election was upheld. In *State v. Echols*, 41 Kan. 1, 20 Pac. Rep. 523, the vote was not full, and one of the modes of advertising having been omitted, the election was held invalid. In each of these cases we think the substance of the matter was regarded, and rightly so. If in the present case all those who failed to vote had appeared and voted, there could not by any possibility have been any change in the result of the election even had the absentees all voted one way. Their votes would have counted for nothing on the final result. To suffer this election to be overthrown upon so slight a ground as the casual omission of one insertion of the notice in the newspaper, would be to sacrifice substance to mere form.

We might be obliged to do this if the election had been attacked before anything substantial had been done upon the faith of it. In *Mize v. Speight*, 82 Ga. 397, there was an omission to advertise in strict conformity with the statute relating to the stock-law, and the question not being made until after the law had been treated by the citizens in consequence of the election as operative, this court held that the omission was a mere irregularity. In *Bowen v. Mayor, etc. of Greensboro*, 79 Ga. 709, the application for injunction was promptly made before the election had been acted on to the injury of any one, and the ruling here was that the injunction ought to be granted. There is no doubt that mere irregularities, in executing laws touching taxation, public money and public indebtedness, ought to count for much where they are complained of promptly and properly. But where they are acquiesced in until injury would be done by recognizing them as fatal, they should have no force or influence upon the substantial rights of parties litigant. They are then within the spirit of our general law touching elections which declares that "No election shall be defeated for non-compliance with the requirements of the law, if held at the proper time and place by persons qualified to hold them, if it is not shown that by that non-compliance the result is different from what it would have been had there been proper compliance." Code, §1334.

3. As to the constitutionality of the local act there can be no doubt so far as its main features are concerned. Were it unconstitutional in its provisions relating to admitting pupils who are not residents of the town, those provisions would fail, but this would not interfere with the general scheme of the law. We however think that under a proper construction and administration of the act, it is not unconstitutional in this respect. The act certainly does not contemplate

that non-residents are to be educated at the expense of the tax-payers of the town. The power given to the board of education to fix the terms is not a power to be exercised so as to work that result. No terms can be fixed which will make the expense to non-residents less per scholar than the expense per scholar to the tax-payers of the town for supporting the school. In other words, non-residents are at least to pay for their own tuition, and the people of the town are not to be burdened as tax-payers with any part of the same. The board can put terms upon non-residents which will make their tuition a source of revenue to the school, but cannot allow terms which will make it an expense upon the inhabitants of the town. If the power has not been thus construed heretofore, it must be so construed hereafter, as this is the only construction which the local act in the light of general principles will bear. The board must exclude all non-residents who fail to contribute as much per scholar for the non-resident children as the tax-payers of Lumpkin contribute per scholar to educate the children of the town. Furthermore, the board would have no power to admit non-residents at all to the exclusion of any resident applicant for tuition. It would only be to unoccupied seats in the school that non-residents could be admitted, and they could remain only so long as their seats were not called for by or on behalf of resident pupils. The sufficiency of the title of the act to cover all its provisions is disputed, but there is no ground for this contention. *Hope v. Gainesville*, 72 Ga. 246.

4. One provision, in the 6th section of the act, is clearly unconstitutional, if taken in the full breadth of its letter and applied to the children of the town as well as to non-resident pupils. It reads as follows: "The said board of education shall require each child, upon entering said schools, to pay to said board an in-

cidental fee of not less than five dollars nor more than ten dollars per scholastic year, and that no child shall attend said schools or enjoy the benefit thereof in any manner until the required fee is paid; provided, that said board may require said incidental fee paid in quarterly installments." A public school system from which resident pupils can be excluded because they are unable or unwilling to pay for admission, is not the system contemplated by the constitution. As will appear from the extract quoted under the second head of this opinion, authority may be granted to establish and maintain public schools by local taxation. There is no hint in the constitution that these schools are to be open to persons who pay and closed against those who do not pay. So to treat them would put them out of harmony with the common school system of the State provided for in a preceding paragraph of the constitution (Code, §5204); as to which the constitution expressly declares: "The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." There can be no doubt that municipal public schools, in so far as they perform the functions of common schools, are to be free to the children of the municipality, just as the ordinary common schools are free to the children of the State. And that the public schools contemplated by the local statute for the town of Lumpkin were intended to perform the functions of common schools, is shown by the fact that the local board of education is authorized by the statute to receive and disburse the *pro rata* share of the State school fund for Stewart county for each child attending the school established by the board. It follows, that were it necessary to save the constitutionality of the local act as a whole, it would be incumbent upon the courts to construe the requirement that each child, upon entering the schools is to pay

an incidental fee, and that no child shall attend said schools or enjoy the benefit thereof until the fee is paid, as applying to non-resident children only. So construed, the requirement can have effect; whereas, by taking the language in its broad and most comprehensive sense, it would militate with the constitution.

5. It is suggested, however, that the legislature having plainly declared that "the said board of education shall require each child, upon entering said schools, to pay to said board an incidental fee of not less than five dollars nor more than ten dollars per scholastic year, and that no child shall attend said schools or enjoy the benefit thereof in any manner until the required fee is paid," and the people of the town having voted upon and approved the act with these words in it, the whole act is vitiated because the provision, in its comprehensive and obvious sense, is unconstitutional. It is altogether probable that both the legislature and the people intended the provision to be taken and understood literally, but it is a well-established principle that unless the main purpose of a statute is affected by the unconstitutionality of a particular provision, the whole act is not thereby defeated. We think this rule applies as well to statutes submitted to the people for their approval as to any other acts of the legislature. In *Robinson v. Bidwell*, 22 Cal. 392, it was said: "But if the vote of the people could be considered as the act of legislation, the result would be the same. We must in that case apply the same considerations to determine the validity of a law passed by a direct vote of the people, that are applicable to determine the validity of a law passed by the legislature." We think this sound doctrine, notwithstanding it may be supposed to be in conflict with the view of the Supreme Court of Ohio, as manifested in *The State v. Commissioners of Perry County*, 5 Ohio State, 497. It seems to us that when

the people are called in, whether by the constitution or by a statute, to assist in the act of legislation, the resulting statutory provisions must be tested by the same rules as apply to the enactments of the ordinary legislative power. Whatever can be treated as non-essential in a statute passed by the concurrent votes of the Senate and the House of Representatives, and approved by the Governor, can be so treated when enacted into a valid law by the additional concurrence of the people to be affected thereby. The question then is whether, granting that the legislative purpose must fail as to exacting an annual incidental fee from all children of the town of Lumpkin attending the schools, the whole system of public schools for the town of Lumpkin must be defeated. There can be no doubt that the main purpose of the statute was to have and maintain the schools. If therefore they can be had and maintained without the aid of this fee, the main purpose can be made effectual; otherwise it cannot. The statute denominates the fee in question as incidental, and evidently does not look to it in other than an incidental way as a fund for the support of the schools. On the contrary, it authorizes municipal taxation for that purpose annually, not to exceed one half of one per cent. on all the property in the town subject to taxation. In addition to this, it devotes the *pro rata* share of the State school fund for the county to the general object of establishing and maintaining the schools. Whether these sources of revenue will be sufficient to uphold and execute the main purpose of the act, is a question of fact rather than of law; but we see nothing on the face of the act itself to negative their sufficiency or to indicate that the provision relating to the incidental fee was so essential, either in the legislative or the popular mind, as to warrant the conclusion that the school system provided for by the act would not have been adopted in its main features if



the legislature or the people had foreseen that the fee could not be constitutionally exacted from resident children. This being so, the unconstitutionality of the comprehensive language used by the act touching the incidental fee, does not vitiate the whole act, but is to be rejected, or rather restricted in its operation as we have above indicated. *Warren v. Mayor, etc.*, 2 Gray, 84; *Mobile & Ohio R. Co. v. The State*, 29 Ala. 573; *Robinson v. Bridwell*, 22 Cal. 379; *Cooley Const. Lim.* 209 *et seq.*; *Sutherland on Stat. Constr.* §169 *et seq.*

6. Mere administrative acts on the part of the local board of education are complained of, but it is enough to say of these that they furnish no cause for enjoining the collection of the school tax. If as public functionaries the board fail to execute their duties conformably to law, the remedy is not to cut off their supply of money by enjoining lawful taxation or the collection of taxes legally assessed, but some other appropriate proceeding.

There was no error in denying the injunction.

*Judgment affirmed.*

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JONES v. EUBANKS.

1. Amendment of an affidavit for distress warrant having excluded any claim other than rent, motion to dismiss the warrant on the ground that "it was for other purposes than collecting rent, and was for the collection of corn, fodder and cotton-seed, and not rent," was properly overruled.
2. The verdict not being a part of the record under review, it cannot be determined whether or not the same sets forth with sufficient certainty the amounts due, nor whether it is contrary to law and evidence.
3. An affidavit to foreclose a landlord's lien for supplies furnished to the tenant, specifying the amount due and complying with the other requisites for such foreclosure, without an itemized account of the supplies being attached, is sufficient. If issue were taken on the amount claimed to be due, the court might, on motion, require the plaintiff to attach an itemized account.

4. The judge may give his reasons for his decision of a question properly made before him, although the jury may hear them.
- (a) It may be the duty of the court, in furtherance of justice, under some circumstances to hold up a fund in order that a proper distress warrant may be sued out.
5. Board furnished to the tenant at the table of the landlord, under the rent contract whereby the tenant agrees that the landlord shall have a lien on his crop for his board, is within the spirit of the statute giving landlords the right to secure themselves from the crops of the year in which supplies are furnished, upon such terms as may be agreed on by the parties.
6. There being no evidence that the landlord consented to the removal of the cotton from the premises, or that such removal was necessary in order to enable the tenant to pay his rent, the charge to the jury could not be qualified by reference to these points.

February 7, 1891. By two Justices.

Distress warrant. Amendment. Verdict. Practice. Landlord and tenant. Liens.. Charge of court. Before Judge MILLER. Houston superior court. April term, 1890.

Reported in the decision.

C. C. DUNCAN, for plaintiff in error.

A. S. GILES, *contra*.

SIMMONS, Justice.

1. Eubanks sued out a distress warrant against Jones, on the ground that he was removing his crops from the premises. At the trial Jones moved to dismiss the distress warrant "on the ground that it was for other purposes than collecting rent, and was for the collection of corn, fodder and cotton-seed and not rent." His motion was overruled, and he makes this the first ground of his motion for new trial. There was no error in overruling the motion to dismiss, inasmuch as it appears in this ground of the motion that the plaintiff amended his warrant so as to exclude everything except rent, and the affidavit sent up in the record shows that, if there was anything in the original affidavit but a claim for rent, it had been stricken therefrom. The affidavit in the record contains nothing of that kind,

but only claims so much cotton and the price thereof. But we are not to be understood as holding that the motion should have been granted, if no amendment had been made.

2. The second ground of the motion complains that the verdict does not set forth with sufficient certainty the amount due on the distress warrant and the amount due for supplies. We cannot determine from this record whether this is true or not, as the verdict was not set up, nor was it specified by the plaintiff in error in his bill of exceptions. The same may be said of the third, sixth and seventh grounds of the motion.

3. The fourth ground complains that the court erred in not dismissing the foreclosure of the lien for supplies on the ground that no itemized account was attached to the lien foreclosure or furnished to the court. We do not think it necessary, in foreclosing a landlord's lien for supplies furnished a tenant, to attach thereto an itemized account of said supplies. If the affidavit specifies the amount due and complies with other requisites of the law on the foreclosure of liens, it is sufficient. If the defendant should resist the foreclosure of the lien and dispute the amount claimed to be due in the affidavit of foreclosure, it then becomes a suit in court, and the court might, upon defendant's motion, require the plaintiff to attach an itemized account.

4. The fifth ground complains that the court erred, during the trial and in the presence and hearing of the jury, in asking counsel for the defendant, "Of what practical benefit will it be for the defendant to show that the distress warrant was prematurely issued; will it not be the duty of the court to direct that the funds be held until a proper warrant can be sued out?" It would seem that this was not said to the jury in the way of a charge, although they may have heard it. It

appears to have been a colloquy between the court and the counsel, and a reply by the court to some question or motion by the counsel. If we were to hold this error, it would be virtually to rule that the jury must be sent from the presence of the court whenever a motion is made to dismiss a warrant or to nonsuit a case. It is the duty of the court to decide all proper questions made before him, and it cannot be error for him to give his reasons in doing so, although the jury may hear them. Moreover, we do not think that the principle announced by the court in his question to the counsel was wrong. It may be the duty of the court, in the furtherance of justice, under some circumstances to hold up a fund in order that a proper distress warrant may be sued out.

5. The eighth ground complains that the court erred in charging the jury that "board could be reserved as provisions and supplies, and a lieu therefor could be created on the crop, and enforced by foreclosure of lien." Our code, §1978, declares: "Landlords furnishing supplies, money, farming utensils, or other articles of necessity to make crops, or furnishing clothing and medicines, supplies, or provisions for the support of families, or medical services, tuition or school books, shall have the right to secure themselves from the crops of the year in which such things are done or furnished, upon such terms as may be agreed upon by the parties," etc. See Acts of 1874, p. 18. The evidence in this case shows that the landlord rented to the tenant certain lands on which to make a crop, and agreed to board the tenant at her private table, for which the tenant agreed to pay her 875 pounds of lint-cotton and entered into a written contract whereby he agreed that she might have a lien on his crop for his board. We are inclined to think that, under this state of facts, when the landlord furnished board to the tenant, the board was in the nature of "supplies." If the landlord had furnished meat and

meal or flour, no one would say that the tenant could not, under the section above quoted, give the landlord a lien therefor upon the crop. We can see but little difference between furnishing the tenant the raw material and furnishing it to him cooked. The statute of Wisconsin provides for a lien in favor of persons furnishing supplies to men engaged in getting out logs and timber. In the case of *Kollock v. Parcher*, 52 Wis. 393, the Supreme Court held that the word "supplies" in that statute included the board of the men, even when furnished at a hotel in a city several miles from the place where they were at work. In the case of *Winslow v. Urquhart*, 39 Wis. 260, it was held that, where the statute gives to any person "that shall furnish any supplies, or that may do or perform any labor or services in cutting, falling, hauling, . . . any logs or timber" a lien on them "for the amount due for such supplies, labor or services," these terms include an amount due under contract for cooking food for the men engaged in driving logs. In the opinion on page 268, Lyon, J., says: "It seems to us that the person who cooks the food for the men who fall the trees and work directly and immediately upon the logs or timber, performs service in cutting, falling, driving, etc. such logs or timber, within the meaning of the statute, equally with those who use the axe, the saw or the team to the same end. These are all engaged in the business of manufacturing trees into logs and timber, and transporting the same from a forest to a market; and to accomplish the common purpose, the labor of each in his department is necessary. Moreover, he who cooks the food 'furnishes supplies,' equally with the person who furnishes the raw materials. The acts of both are essential to the supplying of the men with food, and both 'furnish supplies,' within the meaning of the statute." To say the least of it, while the board, under the facts of this case, may not be within the very letter

of the act, it is certainly within the spirit of it. And if the tenant agrees for the landlord to furnish him cooked provisions or supplies, instead of the raw materials, we think he may give the landlord a lien on his crops therefor.

6. The ninth ground alleges error because the court charged "without qualification, that if the jury believed from the evidence that the tenant was moving the crop from the rented premises, or seeking to remove the same, the plaintiff had the right to sue out a distress warrant, without qualifying said charge, that if the removal was necessary in order to enable the tenant to pay his rent, or if the defendant was removing the same with the consent of the landlord, then the warrant would not lie." It was argued before us that the evidence showed that the tenant was simply hauling his cotton from the premises to a public gin, and that he had the consent of the landlord thereto, and the object of the ginning of the cotton was to sell it and pay the landlord the rent. We have examined this record and find in the brief of evidence that the tenant had requested permission of the landlord to move the cotton from the premises, and that the landlord refused to allow the cotton to be moved. Another witness testified that he heard Jones say that he was going to carry two bales of cotton to Macon, as soon as he could get it ginned. This is the only evidence we can find upon the subject of the removal of the cotton from the premises. What the intention of the tenant was, whether to sell the cotton and pay the rent or not, does not appear in the record. And in the case of *Daniel v. Harris*, 84 Ga. 479, it was held by this court that a tenant seeking to remove from the premises any portion of the commercial crops before the rent is due, without his landlord's consent, is subject to distress immediately, no matter what may be the purpose or intent of such removal. So we think there was no error in this charge.

*Judgment affirmed.*

## FREEMAN &amp; SIMMONS v. STURGIS NATIONAL BANK.

LUMPKIN, J.—When, on the trial of a claim case, there was no evidence at all showing that the property levied on either belonged to, or was in possession of, the defendant in *ft. fa.*, the court rightly ordered the levy to be dismissed. *Judgment affirmed.*

February 7, 1891.

Claim. Levy. Evidence. Before Judge MILLER. Bibb superior court. April term, 1890.

An attachment *ft. fa.* in favor of Freeman & Simmons against Marmon was levied upon a car-load of oats, which was claimed by the Sturgis bank. On the trial the plaintiffs introduced a bill of lading issued by a railroad company to Marmon, for transportation of the oats from Hillsboro, Texas, to Macon, Georgia, consigned to the order of J. N. Porter, cashier; containing direction to notify Freeman & Simmons, and endorsed, "Deliver to the order of J. W. Cabaniss, cashier. C. A. Sullensberger, assistant cashier." Also, a draft attached to this bill of lading, drawn by Marmon in favor of Porter, cashier, on one Stroemer, Macon, Georgia, and endorsed by the Sturgis bank, Hillsboro, Texas, with the further endorsement (signed by Porter, cashier) to pay to Cabaniss, cashier, or order, for collection, and credit the Sturgis bank. Freeman, one of the plaintiffs, testified that their claim against Marmon arose out of a purchase from him of a lot of oats, of which this car was a part; that he never heard of Rosenbaum Bros. or the Sturgis bank until the filing of the claim, the entire transaction being by letters and telegrams, and his knowledge being derived entirely from the correspondence, he having never seen Marmon or had any dealings with him otherwise; and that the draft for the purchase price of the oats with the bill of lading attached was presented to plaintiffs for payment, and they refused to pay it. It further appeared that

Marmon was a clerk for Rosenbaum Bros., who by his consent used his name and bought the oats with money furnished by the Sturgis bank, under an agreement that that bank was to have the proceeds of the sale and that the bill of lading and draft should be made in its favor, which was done, the bank holding them as collateral security for what was due it by Rosenbaum Bros., and when the draft was drawn, crediting their account with the amount of the draft; and it never knew Marmon in connection with the oats, and they were never the property of Marmon, but were bargained to the plaintiffs by Rosenbaum Bros. Porter was the cashier, and Sullensberger the assistant cashier, of the Sturgis bank; and the draft and bill of lading attached became the property of that bank, and were sent by it to the bank in Macon, of which Cabaniss was cashier, for collection and remittance. The oats were not to be delivered to the plaintiffs except upon payment of the draft. When they were shipped, Rosenbaum Bros. owed the bank several thousand dollars; the bank advanced them money for no particular time. Plaintiffs must have known, before they instituted their suit, that Marmon was not the owner of the oats, as Rosenbaum Bros. over their firm name had written to them, enclosing an invoice of the oats and informing them of a draft being drawn on them.

The levy was dismissed for want of proof, and the claim sustained. The plaintiffs excepted.

M. R. FREEMAN, by brief, for plaintiffs.

STEED & WIMBERLY, by brief, for defendants.

# THE CENTRAL RAILROAD COMPANY v. HUBBARD.

1. A declaration alleging that the plaintiff's husband, an employee of a railroad company, was killed by an engine of the company, setting forth such a statement of the facts and circumstances con-

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93	515
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122	867
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129	118



nected with the killing as did not of themselves negative the existence of negligence on the part of the company, and distinctly averring that the deceased was without fault, and that the killing was caused by the negligence of the company's servants in the running of such engine, was not demurrable.

2. Whether or not the presumption of negligence, which §3033 of the code provides shall in all cases be against a railroad company, has been removed, is a question of fact for the jury, and not one of law to be determined by the court.
3. In a suit against a railroad company by a widow for the killing of her husband, who was an employee of the company, a request to charge, grouping together certain alleged facts tending to show negligence on the part of the deceased, and instructing the jury that if these facts be true the plaintiff cannot recover, without leaving the jury to determine whether such facts did or did not constitute negligence on his part, was properly refused.
4. When the plaintiff's declaration alleges that her husband was killed in a specified way by the negligent running of a particular train or engine of a railroad company, and the proof shows that he was killed by another engine of the company, and in a manner different from that alleged, and the evidence is such that, in any view of the case, the plaintiff's right to recover is very doubtful, a verdict in her favor should be set aside.

February 7, 1891.

Negligence. Railroads. Presumptions. *Allegata et probata*. Verdict. Before Judge MILLER. Bibb superior court. April term, 1890.

Reported in the decision.

R. F. LYON, for plaintiff in error.

DESSAU & BARTLETT, *contra*.

LUMPKIN, Justice.

1. The declaration in this case alleges that the plaintiff's husband, who was in the employment of the Central railroad as a track-hand, was killed by the negligent running of an engine or train of the company. It undertakes to state the circumstances of the killing, and the allegations of the declaration are not such as, of themselves, would negative the existence of negligence on the part of the company. Besides, it distinctly alleges that the deceased was entirely free from

fault or negligence, and further, that his death was caused by the negligence of the company's other servants. If all the allegations in the declaration are true, a cause of action is set forth, and it was not necessary that the plaintiff should minutely and in detail describe every fact and circumstance in the case which would tend to show the want of negligence on the part of the deceased. The declaration was sufficiently full and accurate to inform the defendant of the nature of plaintiff's complaint, and this is all the law requires.

2. On the trial, the defendant's counsel requested the court to charge as follows: "No presumption of negligence arises against the railroad company in cases of injuries where the evidence shows how the injury occurred, and where all the facts and circumstances are in evidence which resulted in the injury complained of. In such cases, negligence or no negligence depends on the facts in evidence, and not upon presumption"; and further, "No presumption of negligence on the part of the defendant can arise, if the facts in evidence show how the injury did happen, and what caused it. In such cases, the negligence will depend on the facts in proof, and not upon the presumption arising from any cause." Section 3033 of the code plainly declares that in all cases of this kind the presumption of negligence shall be against the company. The requests quoted are to the effect that on the trial of *some* cases this presumption shall not arise, or at least, that it must not be considered by the jury in arriving at a proper verdict. To give such instructions to the jury would be to disregard the plain meaning of the statute. If, in any case, all the facts and circumstances are proved, it would still remain a question for the jury to determine whether or not the legal presumption had been removed, and this function should not be limited or taken from them by the court. The idea of the defendant's

requests is, that where the case has been fully developed, and the evidence shows exactly what occurred, then the case should be decided on the facts as they appear, and without regard to presumptions; but, under the law, the plaintiff is entitled to the benefit of this presumption against the company, in connection with all the facts, in having the jury arrive at a proper conclusion. In other words, this presumption goes through the entire trial, the question always being whether it has or has not been removed or rebutted by the evidence. Of course, it may be so rebutted, and this can be done by evidence introduced by plaintiff as well as by defendant; but the jury, and they alone, must say whether the presumption remains or has been removed, and it is not for the court to deprive them of this right, or relieve them of this duty, by any instruction given. Again, it rarely, if ever, happens that *all* the facts of a case are brought out, and even if these requests were proper in a case where the whole truth had been developed, it would almost invariably be a matter of the gravest doubt whether this had been done, and hence it would most generally be of exceedingly doubtful propriety and justice to apply such a doctrine. It is highly probable that in another trial of the case now under consideration other facts will be made to appear on both sides.

3. Except as to those things which the law declares shall constitute negligence *per se*, it is always a question of fact for the jury, and not one of law for the court, whether or not given conduct or acts are negligent. Hence, a request which grouped together a number of alleged facts, tending to show negligence on the part of an employee who had been killed by a railroad, and instructing the jury that if these facts are proved there could be no recovery against the company, was rightly refused. Such an instruction, if given, would

have taken from the jury the right and duty of saying whether these particular facts did or did not show negligence, which is their peculiar and exclusive function in such cases. If the request, after reciting hypothetically the alleged facts, had been qualified by some such words as these, "and if you further find that these facts showed negligence on the part of the deceased in the occurrence under investigation," the court might have given it, for the jury would still have been left free to determine this vital question for themselves; but without some such qualification, it would have amounted, if the facts were as stated, to the court's deciding this important question, and taking it from the jury altogether. This, of course, under our system, is in no case permissible.

4. The plaintiff's declaration alleges, in substance, that her husband was employed as a track-hand by the Central railroad in its freight-yard at Macon; that while employed and engaged on one of its tracks, a train came along thereon, and it became necessary for him to step from said track to avoid that train; that he did so, and stepped upon another track of defendant, and was run over and instantly killed by another engine and train of defendant upon the latter track. The proof showed conclusively that deceased was walking along a track of the railroad, and a freight-engine, to which no train was attached, came along behind him on that track and ran over and killed him, and that he did not, in an effort to avoid said engine, step off said track and get killed by an engine and train on another track. Evidence showing that the deceased was killed by a different engine, and in a different manner from that alleged, was admitted without objection. There being, then, a variance between the declaration and the proof as to the circumstances of the killing, and the evidence, as stated, having been admitted without ob-

jection, the question is presented, whether or not a verdict in plaintiff's favor, based on proof not making a case strictly covered by the allegations of the declaration, should stand.

As ruled in the 4th head-note, we are all agreed that in a case like this, where the right to recover is, in any event, doubtful, the plaintiff should be required to make his proof correspond strictly with his allegations. That is to say, in a doubtful case, the defendant is entitled to all his legal rights, and, accordingly, to be accurately informed by the declaration upon precisely what state of facts, and for what kind of negligence, the plaintiff seeks to make him liable. If the plaintiff's right to recover was plain and manifest, the rule need not be so rigidly enforced.

Speaking for myself only, I am strongly inclined to hold, that the plaintiff should not be allowed to recover in any case, no matter how strong the justice of it may be, upon a state of facts not alleged in his declaration. In the first place, every person should, if possible, understand his rights, and know what his cause of complaint is, before bringing suit, and in most cases, this can be easily accomplished. Where this cannot be done, our liberal law of amendment at any stage of the proceedings, before verdict, gives ample opportunity to make his declaration fit the exigencies of the testimony. Beyond doubt, many decisions, both of this and other courts, may be found where verdicts have been allowed to stand, notwithstanding variations between the *allegata* and the *probata*. For instance, in the case of *Haiman & Bro. v. Moses & Gerrard*, 39 Ga. 708, which was a suit by attorneys at law to recover the sum of \$2,500.00 for "professional services," evidence was admitted on the trial, without objection, tending to show that the plaintiffs were also entitled to a retainer of \$250.00, although there was no count or item in the declaration claiming

such retainer. The verdict being for a little more than one half of the \$2,500.00 sued for, the court held that a new trial ought not to be granted on the ground that the allegations and the proof did not correspond. It is apparent in this case that the amount actually recovered was strictly within the cause of action set forth, and in the evidence as to the retainer, which was simply irrelevant, was calculated to injure the defendants, they might easily have protected themselves by objecting to it when offered. Again, in the case of *Field v. Martin*, 49 Ga. 268, a recovery in favor of Field was sustained, although it appeared that his only right to recover was as survivor, etc. In point of fact, however, Field was survivor, though not so described in the declaration, and the proof showed that he was such survivor. The right person, therefore, recovered the verdict; and although, on the trial, the proof showing that he was survivor would not have been admitted if challenged, yet, as no objection was made to it, this court allowed the verdict to stand. In the case of *Howard v. Barrett*, 52 Ga. 15, the pleadings did not present the whole issue covered by the verdict and judgment, but there was no recovery upon a state of facts entirely different from those alleged in the declaration, and as the case intended to be stated was fully made out by the evidence without objection, it was held that, after verdict, it was too late for the losing party to make the defective pleadings the ground of a motion for a new trial. In *S., F. & W. R. R. Co. v. Barber*, 71 Ga. 648, Chief Justice JACKSON said: "Though the declaration may allege certain specifications of negligence by the servants of the company, yet, if proof be allowed to go to the jury without objection, outside of those alleged, we hardly think that the plaintiff should be held strictly to the *allegata*, no objection having been made to the admission of the evidence, and no motion to rule it out."

The point now being discussed, however, was not strictly ruled, and it is inferable from an examination of that case that the additional evidence merely supplemented the plaintiff's main case as made, and did not make a case of an altogether different kind of negligence. This is, doubtless, the idea upon which some of the cases above cited, and many others, have been ruled. In *Harris v. Central R. R.*, 78 Ga. 525, where the cause of action was the homicide of the plaintiff's husband, alleged to have been caused by the negligent running of the defendant's train, the declaration set forth specific acts of negligence, and the manner of causing the death; but, when the proof showed that the deceased was killed in a different manner from that alleged, it was held that, during the progress of the trial, amendments might be made to adapt the pleadings to the evidence, and this is exactly what might have been done in the present case.

The case of the *Georgia Railroad v. Oaks*, 52 Ga. 410, is precisely in point. The 5th head-note is as follows: "In a suit against a railroad company by a widow for the homicide of her husband, when the declaration alleged a particular act of negligence on the part of the company as the cause of the homicide, it was error in the court to refuse to charge that proof of other acts of negligence will not authorize a recovery unless the jury be satisfied from the evidence that the negligence charged has been proven." In commenting upon this point, Justice McCAY said, on page 416: "Our law requires a plaintiff plainly and distinctly to set forth his cause of action. And if one bring a suit based on one set of facts, it is obviously unfair to permit him to recover on another dropped out incidentally, and perhaps by way of defense. The right to amend is very broad, and if parties desire to modify their cases, it is unfair to do so in a speech to the jury. Here was a definite

act of negligence stated and relied on in the declaration. That other acts bearing that designation dropped out in the proof, did not make out the case, and the court should have charged as requested." The question arose there upon a refusal by the court to charge that proof of acts of negligence other than those alleged would not authorize a recovery; and because of this refusal, a new trial was granted, showing that, in the opinion of the court, the plaintiff ought to have been held to proof of the case made by the declaration. Again, in the case of the *Central Railroad v. Nash*, 81 Ga. 580, a new trial was not granted simply on account of a charge by the court which *seemed* to authorize a recovery upon proof of acts of negligence not charged in the declaration, it appearing, upon examination, that this impression was not intended to be conveyed by the court to the jury, and taking the entire charge together, the evident meaning of the court was "that plaintiff could not recover except upon proof of the specific allegations in the declaration."

The rule I am now seeking to establish is sustained by the ruling of this court in *Mayor, etc. of Montezuma v. Wilson*, 82 Ga. 206, where it was held that, in an action against the city for injuries alleged to have been sustained by stepping into a hole in a bridge, and the proof showed that the plaintiff was not injured by a defective bridge, but by stepping into a hole in a sewer, a verdict for the plaintiff could not be sustained, for the reason that the recovery was on a state of facts different from those alleged in the declaration. A very strong case upon the line now being pursued is that of the *Port Royal & Augusta Ry. Co. v. Tompkins*, 83 Ga. 759. In that case, the negligence alleged against the company was "in not having a key placed in the bolt which fastened the tender to the engine," in consequence of which a fireman was injured. The proof



showed that the bolt was not long enough to go through the place in which it was intended to work so that it could be "keyed," and upon these facts, this court held that the variance between the declaration and the proof was fatal, and reversed the judgment of the court below in refusing to grant the defendant a new trial. Upon the particular facts of this case, the ruling certainly went a considerable length, but whether it went too far or not, the principle on which it was based was that the plaintiff must prove the case made by his declaration in order to be entitled to recover.

In the case of the *Central Railroad v. Avant*, 80 Ga. 195, the plaintiff claimed damages alleged to have been occasioned by reason of the defendant's failure to deliver certain car-loads of melons at Indianapolis, the point of shipment, within a certain time. On the trial, he sought to make the company liable for putting the melons in damaged and unsafe cars, in consequence of which they were injured. This court held that this was an attempt to change the issue made by the plaintiff in his declaration; and commenting thereon, Justice SIMMONS (page 198) says: "When a plaintiff brings a suit for damages, alleging that the defendant has injured and damaged him by failing to deliver certain property at a certain place, he has no right to change the issue on trial, and claim damages on another and different cause of action, without an amendment to the pleadings." In the case now under consideration, so far as this court is informed, no amendment was made to bring the plaintiff's proof into consistency with her declaration. The record does show that an amendment of some kind was made, but as it is not sent up, we cannot consider it.

In view of the rulings above cited, it would seem to be the better practice to require plaintiffs to make out their cases, at least substantially, as laid, and this rule

should not be too much relaxed because defendants do not always object to the admission of irrelevant testimony on the trial. One good reason for failure to object may be that such testimony, if given only its real value, would be harmless. I have expressed the foregoing views with some diffidence, because I am aware of the conflict in the authorities upon this subject, and because, further, I fully appreciate the difficulty of making and stating an unbending and inflexible rule that would fit all cases. The facts of each case are so essentially different from those of most other cases, that it often becomes a very nice question when the variance between the allegations and the proof is sufficient to defeat a recovery. This very difficulty, doubtless, has much to do with the conflicting views and rulings entertained in this class of cases. To the extent this court has ruled in the present case, there can be no doubt, I think, of its safety; and it is clear that more accuracy and care in preparing declarations and pleas would be a decided step towards a safer and better practice.

*Judgment reversed.*

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BROWN, *alias* ADAMS, v. THE STATE.

An indictment for simple larceny, charging the theft of "one dark bay horse with one white spot on the end of his nose and one small white spot in his forehead," did not describe the property alleged to have been stolen, with the accuracy and fullness our statute requires, and a special demurrer thereto on this ground should have been sustained.

February 7, 1891.

Criminal law. Larceny. Indictment. Before Judge MILLER. Bibb superior court. November term, 1889.

Reported in the decision.

HARDEMAN & NOTTINGHAM and DESSAU & BARTLETT, for plaintiff in error.

W. H. FELTON, Jr., solicitor-general, *contra*.

LUMPKIN, Justice.

Sections 4394 and 4395 of the code read as follows: "Horse stealing shall be denominated simple larceny, and the term 'horse' shall include mule and ass, and each animal of both sexes, and without regard to the alterations which may be made by artificial means." "The offence shall, in all cases, be charged as simple larceny, but the indictment shall designate the nature, character and sex of the animal, and give some other description by which its identity may be ascertained." By the first of these sections, the theft of any horse, mule or ass is made "horse stealing," without regard to the sex of the animal, or to any alteration which may be made by artificial means.

The word "horse," as used in this section, is a generic term, which includes horse, as a species, mule, and ass. Horse, as a species, may again be subdivided into stallion, ridgling, gelding and mare, and the same subdivision may be made as to mule and ass. Colloquially, the word "horse," among our people, usually means a male gelding of the horse species. So, if section 4394 was the only one with which we had to deal, it would be proper to sustain this indictment, on the idea, that by it the defendant was sufficiently informed as to what kind of "horse" he was charged with stealing; that is to say, he would understand the word "horse" to mean what it usually does in every-day use and conversation. But the next section provides distinctly what indictments for this class of offences shall contain, and declares that such indictments shall designate the nature, character and sex of the animal, and also give some other description fixing its identity. The latter requirement of this section was complied with, in this case, by giving the color and flesh-marks of the animal, but we do not think the use of the word "horse," which has both a generic and a specific sig-

nification, distinctly recognized by our statute, was sufficient to give the defendant full and fair notice of the "nature, character and sex" of the animal, as the law evidently contemplated should be done. Nor is the defect in this indictment cured by the use of the pronoun "his," because, under section 4, par 3, of the code, the masculine includes the feminine and neuter genders. But even if, in this case, this pronoun is to be understood as meaning a male, it still remains indefinite and uncertain, whether it means a male horse, a male mule, or a male ass; and if a horse, whether he was a stallion, a ridgling or a gelding.

We regard it unnecessary to quote authorities to sustain the ruling herein made, because we think the question at issue is settled by the plain words of our own statute. To give a practical meaning to all the words used in both the sections of the code referred to, leads inevitably, we think, to the conclusion we have reached. The ruling of this court in the case of *Taylor v. The State*, 44 Ga. 263, properly understood, is not in conflict with this conclusion. There, the defendant was indicted for stealing a "chestnut sorrel horse," entered his plea of not guilty, without making any objection to the indictment, and was convicted. He then moved in arrest of judgment, the motion was denied, and this court sustained the court below in so doing. Now, inasmuch as the word "horse" may mean a male horse, of the horse species, and the defendant was satisfied with the description in the indictment, and did not, by demurrer or otherwise, demand any further or more particular description, it was too late, after verdict, to make his objection to the indictment. This is all the judgment in that case amounts to, and we think it was right. We do not wish to be understood as following and adopting all that was said in that case by LOCHRANE, C. J., because we do not think some of his expressions

are borne out by the statute, or a proper course of reasoning thereon. We simply mean to say we agree to what was actually adjudged in that case, and it does not conflict with our judgment in this. Here, the defendant, at the proper time, which was before pleading to the merits, demurred specially to the indictment, and thereby in effect demanded, as was his right, to be distinctly and accurately informed as to the nature, character and sex of the animal he was charged with having stolen, and we do not think this right should have been denied him. Our code, section 4629, recognizes the right of a defendant to take exception to an indictment for any formal defect, provided he does so before trial, that is upon arraignment, and that is precisely what the defendant did in this case.

*Judgment reversed.*

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GRANT v. THE STATE.

Criminal law. Murder. Verdict. New trial.

LUMPKIN, J.—The evidence being ample to sustain a conviction for murder, and no complaint being here made of any ruling by the judge who tried the case below, this court will not interfere with his discretion in refusing a new trial. *Judgment affirmed.*

February 7, 1891.

From Bibb superior court, April term, 1890. Before Judge MILLER.

HARDEMAN & NOTTINGHAM, TURNER & WILLINGHAM and ROBERT HODGES, for plaintiff in error.

W. H. FELTON, Jr., solicitor-general, *contra*.

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HUGULEY v. LANIER, executor.

An antenuptial contract by which the intended husband, on behalf of himself, his heirs, executors and administrators, covenanted under his hand and seal, for and in consideration of the marriage

to be had and solemnized, that his executors, upon his death, should pay over to his intended wife the sum of \$4,000, this sum to be her full and complete distributive share in his estate, she under her hand and seal covenanting that she would abide by the terms of the instrument, is not testamentary in its nature, but creates an absolute, irrevocable obligation binding upon his qualified executor, and upon which an action for the recovery of the money may be maintained after the husband's death.

February 23, 1891. By two Justices.

Contracts. Marriage. Husband and wife. Debtor and creditor. Before Judge HARRIS. Troup superior court. April term, 1890.

Mrs. Sallie Huguley, widow of George Huguley, by her petition alleged that LaFayette Lanier, executor of George Huguley, was indebted to her \$4,000 and interest, for that, on July 28, 1885, George Huguley entered into an antenuptial contract with the petitioner who was then unmarried, her maiden name being Sallie Hughes White, whereby, in consideration of the marriage afterwards to be solemnized, he promised upon his death that his executors should pay her \$4,000; that in pursuance of the contract the marriage was solemnized; and that he died in 1886, and Lanier was duly qualified as his executor more than twelve months before the bringing of this suit, and refuses to pay petitioner the \$4,000 with interest thereon from the death of George Huguley, at which time the money to pay the same was in the hands of the executor. Attached as an exhibit was the contract, as follows:

The State of Georgia, } This indenture made and entered into this 28th day of July, A. D. 1885, between George Huguley and Miss Sallie White, both of said State and county, the said George Huguley voluntarily and of his own accord moving hereunto, witnesseth that the said George Huguley, for and in consideration of the marriage to be had and solemnized between himself and the said Sallie White, does for himself, his heirs, executors and administrators, covenant, grant, agree and direct that in addition

to the instructions given in his will and the codicil thereto attached, particularly and explicitly direct that his executors upon his death shall of the first money coming into their hands of my estate, and as soon as such money shall come into their hands as such executors after paying my just debts, expenses of last sickness and funeral expenses, pay over to my then widow, now Miss Sallie White, the just and full sum of four thousand dollars, taking her receipt for the same, this sum to be her full and complete distributive share in my estate, and she is not to participate further in my estate unless I should see proper to verbally give her any money or property before my death; and after my executors shall have delivered to her the four thousand dollars as herein directed, they will then execute my will as therein directed. This I do for the reasons that I do not wish any trouble or contention about my estate that I may leave at my death, that I desire and so intend that it may be distinctly understood, to make a permanent provision for my wife should I depart this life suddenly, as I have been informed by my physician that I have symptoms of heart disease and may be called hence without notice; and further that she my intended wife is agreeing to this arrangement as herein expressed, as witnessed by her written consent hereto.

Witness my hand and seal, the day and date above written.

Signed, sealed and delivered in duplicate in presence of

Mary S. Harris, George Huguley (L. S.)  
B. L. Harris, Notary Public.

State of Georgia, } I Sallie White do hereby fully  
Troup County. } and without reserve, having read  
over and fully understanding the contents of the foregoing instrument made by my intended husband George Huguley, consent, agree to and will abide by the same.  
Witness my hand and seal this July 28th, 1885.

Signed and sealed in duplicate in presence of  
Mary S. Harris, Miss Sallie Hughes White (L. S.)  
B. L. Harris, Notary Public.

At the trial the plaintiff offered this contract in evidence, but it was rejected on the ground that it was

not a deed or contract but only a testamentary paper, and had not been probated by the proper court and could not be sued upon. A nonsuit followed, and the plaintiff excepted.

F. M. LONGLEY and N. J. HAMMOND, for plaintiff.

T. H. WHITAKER, P. H. BREWSTER and R. A. S. FREEMAN, for defendant.

BLECKLEY, Chief Justice.

The superior court classified the stipulations of the instrument declared upon as testamentary in their nature. This was a total misconception. The instrument is not a conveyance, but a covenant to pay money. There was no attempt to establish between the parties the relation of donor and donee, or of testator and legatee, but the relation established by the covenant was that of debtor and creditor. In contemplation of marriage, the prospective husband, on behalf of himself, his heirs, executors and administrators, covenanted under his hand and seal, for and in consideration of the marriage to be had and solemnized, that his executors upon his death should pay over to his prospective wife the sum of \$4,000, this sum to be her full and complete distributive share in his estate. On her part she covenanted, under her hand and seal, that she would abide by the terms of the instrument, and consequently that she would not participate further in his estate, unless he should see proper to give her any money or property before his death. These are the substantial provisions of the instrument as an antenuptial contract, and the suit is brought to recover the \$4,000, the plaintiff alleging in her declaration that the marriage took place as contemplated, that her husband is dead and that the defendant is his qualified executor, having assets with which to make payment. The contract was absolute and irrevocable. The husband had no more power to



abrogate or revoke it than the wife had. It bound them both equally. It was a bar to any claim of dower which she otherwise would have had. Code, §1764; *Culberson v. Culberson*, 37 Ga. 296; *Hamilton v. Jackson*, 2 Jones & LaT. 295; *Andrews v. Andrews*, 8 Conn. 79; *Naill v. Maurer*, 25 Md. 532. Authority coincides with principle in rendering such an undertaking obligatory upon the husband's estate and legal representatives. *Smith v. Stafford*, Hobart, 216; *Clark v. Thomson*, Cro. Jac. 571; *Goodwin v. Goodwin*, *Id.* 570; *Cage v. Acton*, 1 Ld. Raym. 515; *Acton v. Pierce*, 2 Vern. 480; *Milbourn v. Ewart*, 5 T. R. 381; *Rivers v. Rivers*, 3 Dess. 190. And see *Carter v. King*, 11 Rich. 125; *Godbold v. Vance*, 14 S. C. 458.

A contract does not take on a testamentary character because its performance is postponed till after the death of the maker and devolves upon his representatives. Even a parol promise to be performed after death may be obligatory. *Powell v. Graham*, 7 Taunt. 580; *Riley v. Riley*, 25 Conn. 154. A promissory note may be made payable after the maker's death. *Roffey v. Greenwood*, 10 Ad. & El. 222; *Bristol v. Warner*, 19 Conn. 9. Or after the death of a third person. *Cooke v. Colehan*, 2 Stra. 1217, s. c. Willes, 393; *Washband v. Washband*, 24 Conn. 500.

Were the covenant in question considered as a contract to make a will, it would be none the less obligatory, for such contracts are enforceable, and if not performed, a recovery may be had for their violation. *Napier v. Trimmier*, 56 Ga. 300; *Johnson v. Hubbell*, 66 Am. Dec. 773, and notes; *Manning v. Pippen*, 11 Am. St. Rep. 46, and notes.

Of course treating the covenant as having this latter import would involve some change in the pleading as well as in the evidence. We think the pleader in this case adopted the right construction, and that the action

was well brought upon the instrument as an absolute undertaking, not to make a will leaving the plaintiff \$4,000, but to pay that sum out of his estate as a debt chargeable upon the same. The court erred in excluding the instrument when offered in evidence to support the action. A full copy of the document is in the official report.

*Judgment reversed.*

THE GEORGIA RAILROAD & BANKING COMPANY v. ESKEW.

1. There was evidence from which the jury could infer that the plaintiff was wrongfully expelled from the train and thereby denied the enjoyment of his legal rights as a passenger. It is no excuse for expulsion that the conductor made a negligent mistake as to the station indicated on the face of the ticket which the plaintiff had exhibited and surrendered to the same conductor.
- (a) A passenger need not wait to be forcibly ejected. If before or after the train reaches a certain station he is ordered by the conductor to get off at that station, the order seeming to be peremptory and the passenger so understanding it, he may yield to the conductor's authority and leave the train at the station indicated, though the conductor be not immediately present when this is done. In such case if the passenger acts contrary to his own will and in obedience to the conductor's command, he is coerced and is entitled to redress for his expulsion.
2. Where punitive as well as compensatory damages are in question, the intention involved in the alleged tort is material. Whether the conductor intended to expel the plaintiff or was misunderstood as to his purpose was relevant evidence on the claim for punitive damages. The conductor was competent to testify as to what his intention really was.
3. In arriving at the conductor's intention the jury could consider that he remained silent on hearing the plaintiff remark, after he alighted from the train, "that it was hard to be put off and be compelled to pay one's fare."
4. The cause of action being traceable to a mistake of the conductor and not to his wilful or intentional violation of the plaintiff's rights, a verdict for \$750.00 damages has the appearance of being excessive under all the facts and circumstances in evidence.
- 5-6. A person upon whom a wrong has been committed is under obligation to lighten the consequential damages as much as he can by the use of ordinary care and diligence. This applies, in case of an expelled passenger, to the time and mode of traveling from

86	641
95	248
86	641
98	684
86	641
104	696
86	641
119	283
86	641
124	300

the place of his expulsion to the station at which he was entitled to be set down. It applies also to fatigue, hardship, and injury to his health involved in reaching there. Though he could not be compelled to pay fare to avoid wrongful expulsion, after being expelled he could not recover damages for walking and its consequences when he might have reached the station more cheaply and expeditiously and with less injury to his health by riding on the same or a subsequent train, or by securing other conveyance. Nor, as a general rule, could he recover for inconvenience, hardship or injury to health originating after reaching the station to which he was entitled to be carried, or needlessly caused by walking and exposure before reaching there.

7-8. Compensation for wounded feelings, as well as punitive damages, should be adjusted to all the circumstances of the actual case.

February 23, 1891. By two Justices.

Negligence. Railroads. Passengers. Damages. Evidence. Before Judge HINES. Rockdale superior court. August adjourned term, 1889.

Reported in the decision.

J. B. CUMMING and A. C. McCALLA, for plaintiff in error.

H. T. LEWIS and G. W. GLEATON, *contra*.

BLECKLEY, Chief Justice.

The learned counsel for the railroad company argued only four of the grounds of the motion for a new trial. To these our opinion will be confined.

1. That the evidence, construing it as we are bound to do, most favorably for the prevailing party, warranted a verdict for some amount against the company, we have no doubt. The tickets surrendered to the conductor by the plaintiff and his brother were from Atlanta to Social Circle; and that the conductor could and would have known this, had he exercised due care in the transaction of his business, admits of no question. If by reason of his own negligent mistake he expelled the plaintiff at Conyers, an intermediate station, when the plaintiff was rightfully on the train and entitled to be carried to his destination at Social Circle, the expul-

sion was wrongful and a breach of the legal duty of the company as a common carrier. A passenger who has paid for and supplied himself with a ticket in all respects valid and regular, boarded the proper train, conducted himself thereon in a proper manner, and surrendered the ticket to the company at its own request, cannot be required either to produce the ticket when again called upon for it, or to pay fare as a condition of remaining upon the train and being carried to the point indicated upon the ticket as the *terminus* of his route. He has no further concern with the ticket, and can lose none of his rights by any mistake made by the conductor in reading it, construing it, mingling it with other tickets or disposing of it otherwise.

(a) Although the conductor neither used physical force to expel the plaintiff from the train nor was immediately present when the plaintiff left the train at Conyers, yet it was in fact an expulsion if the plaintiff alighted against his own will and as an act of obedience to the conductor's previous command. Nor does it matter whether the command was given shortly before the train arrived at Conyers, or after its arrival, provided it was or seemed to be peremptory and the plaintiff so understood and treated it. There was evidence from which the jury could infer that the command appeared peremptory, and that the plaintiff yielded to it in good faith. Whilst a passenger cannot avail himself of a formal order of the conductor, not meant to be absolute and final, as a pretext for leaving the train and grounding an action against the company for expulsion, yet, where the circumstances fairly warrant him in believing that the conductor means what he says, and he really does believe it, he need not wait for the employment or actual force against him, but may submit to the moral coercion of the conductor's authority, and may abandon the train as an expelled passenger. If conductors do

not mean that passengers shall withdraw themselves from trains, they should not issue their commands prematurely. All passenger conductors are by statute invested with the powers of police officers while on duty upon their trains. Code, §4586(a). A passenger, whether right or wrong in any contention or misunderstanding with a conductor, is under no duty, legal or moral, to stand out until the conductor appeals to force for the execution of his commands. If the passenger obeys and thereby does an act to which his own will does not consent, he is coerced. *Georgia Railroad v. Homer*, 73 Ga. 251. So far from being under a duty to resist, he would generally put himself in the wrong by offering resistance. For the sake of peace and good order he ought to submit.

2. Section 3066 of the code reads thus: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." This section was applicable to the case as made by the evidence of the plaintiff below, and was properly given in charge to the jury. *Georgia Railroad v. Homer*, 73 Ga. 252; *Georgia Railroad v. Olds*, 77 Ga. 674. For this reason the intention of the conductor was for investigation and determination by the jury as an element affecting punitive damages. *Georgia Railroad v. Homer*, *supra*. If the purpose of the conductor was misunderstood, and he really had no intention of expelling the plaintiff from the train, although he had used language calculated to produce that impression, there was no aggravating circumstances taking its character from intention, and therefore no aggravating circumstance at all, unless found in the act itself considered apart from intention and viewed in the light of the time, place and

manner of its commission. From the general tenor of the conductor's evidence, it is highly probable he would have testified, had he been allowed to do so, that he had no intention to expel the plaintiff at Conyers. We think the court erred in refusing to allow counsel for the company to ask the conductor "whether or not it was his purpose to eject plaintiff from the train." As bearing upon the question of punitive damages, this was a legitimate inquiry; and there can be no doubt that the conductor was a competent witness to prove what his intention really was. There were divers circumstances in evidence tending to show that he intended expulsion. His answer on oath that he did not would have been direct evidence to the contrary of what the circumstances as indirect evidence tended to establish. In deciding upon the question of intention, the jury should have had before them both the direct evidence excluded and the indirect which was admitted. The company could not escape being affected by the conductor's intention, and this being so, it should have been allowed to show what that intention was. If the plaintiff had afterwards waived any claim for punitive damages, this error of the court would have been immaterial, but as there was no such waiver, and as the amount of damages awarded by the jury was very large for such a case, we think the company is entitled to a new trial on this ground.

3. There was no error in charging the jury as set out in the 13th ground of the motion for a new trial, that in determining whether the conductor intended to eject the plaintiff, the jury could take into consideration the remark made by the plaintiff after he alighted from the train but in the presence and hearing of the conductor, "that it was hard to be put off and be compelled to pay one's fare," and the failure of the conductor to make any reply to it. The conductor ad-

mitted in his evidence that he heard the observation and made no reply. He does not explain why he made none. If he had been misunderstood he could easily have said so to the plaintiff in answer to the remark above quoted, and the jury might think it a legitimate inference from his silence that he was not misunderstood. True, the whole scene bears a different construction, but what it really meant was for the jury; and the court merely submitted it for their consideration. This was correct. But that it was correct makes it more clear that the court erred, as we have ruled under the preceding head, in not allowing the conductor to testify with reference to his intention; for if his silence at the time of the transaction would throw light upon it, why would not his direct statement under oath at the trial be receivable to show what it really was? The charge, it will be noticed, relates to *actual* intention, the kind of intention which might aggravate the tort and serve as a basis for punitive damages. To allow compensatory damages, it would not be necessary for the jury to find actual intention; it would be enough for them to find apparent intention, that is, such manifestation of intention by the conductor as would justify the plaintiff in believing that he had made up his mind to expel the plaintiff, although he had no such purpose and was in fact misunderstood.

4. As a new trial is to be had, it is not absolutely necessary for us to decide whether the damages, assessed at \$750, were excessive or not. We are strongly inclined to the opinion that the amount is out of reasonable and conscientious proportion with the magnitude of the injury. Numerous instances tending to illustrate the question of excessive damages by actual cases, are collated in 5 Am. & Eng. Enc. L., p. 55 *et seq.*, but at last each case must be ruled chiefly on its own facts and special circumstances. In the present case there is no

indication in the evidence, taking it all together, that there was any wilful or intentional violation of the plaintiff's rights on the part of the conductor. No doubt he was in error and that he fell into error on account of his own negligence. It was his duty to know that the tickets which he took up from the plaintiff and his brother were for Social Circle, and his failure to know it and have the means of verification afterwards is without any reasonable excuse that we can discover in the record. Between the conductor and these two passengers there were probably three misunderstandings. He thought either that they got on the train at Stone Mountain, or with tickets for that point and no further; they knew that they got on at Atlanta with tickets for Social Circle. He thought they claimed to have had and surrendered tickets for Greensboro; they were sure they did not tell him they had tickets for that station. He thought he had not ordered them in a final and peremptory way to leave the train at Conyers; they construed his language as requiring them to do so. Without imputing perjury to any witness, the fact that two if not all three of these misunderstandings existed can be arrived at with a fair degree of certainty. Throwing all the blame on the conductor and allowing the jury the fullest scope in the exercise of their discretion which the law recognizes, what are the elements of damage? They are, first, compensation for pecuniary loss, for necessary inconvenience and physical hardship, and for proximate injury to health; second, compensation for wounded feelings; third, punitive damages.

5. The direct pecuniary loss was the cost of going to Social Circle from Conyers by the first available and appropriate conveyance, together with the expense and loss of time incident to waiting for and procuring such conveyance. A person upon whom a wrong has been



committed is under obligation to lighten the damages as much as he can by the use of ordinary care and diligence. To the extent in which his damages are increased by his failure to observe such care and diligence, they are the result of his own negligence. *Field Dam. §126 et seq.*; 1 *Sedg. Meas. Dam. 164 et seq.*; *Weeks Dam. Ab. Inj. §121*; 1 *Suth. Dam. 148*. In such a case as this, where the only fault or mistake involved in the cause of expulsion was on the part of the conductor, it was not the duty of the passenger to pay fare to prevent expulsion. He was under no obligation, legal or moral, to purchase exemption from a threatened or impending tort, but could stand upon his legal rights or waive them according to his election. He could not be made a trespasser where he had a legal right to be and remain, unless he waived that right, and he could not be forced by the conductor or any other human power to waive it. He had purchased it with his money, it was a vested right, and not even the legislative power of the State could deprive him of it, or force him to yield it against his will. And to expel him from the train when he was not a trespasser nor otherwise at fault, was to commit upon him a tortious injury. To eject as a trespasser one who is not an intruder, is not to make him a trespasser but to become one yourself. *Bishop Non-Contract Law, 1096*.

But as soon as the act of expulsion was complete, the plaintiff became subject to the rule of diligence to which we have just referred. The expulsion was not at night but in the afternoon. It affirmatively appears that he had money enough to procure transportation by the same train from Conyers to Social Circle, the distance being twenty-one miles. Perhaps he might be excused for not taking passage on that train, but after spending the night at Covington, he still had money enough, and more than enough, to pay his way and

that of his brother to the point to which the company ought to have carried them in the first instance, it being only eleven miles. It thus appears that the plaintiff was not obliged to walk in order to reach Social Circle, and if he did so at a greater cost of money and time than he need to have expended in waiting for a train and going by railway, he was not without fault. His recovery on this item should be limited to what it would have cost him in money and time to reach Social Circle from Conyers by the cheapest appropriate means which he could have used in the exercise of ordinary diligence, unless he suffered further direct damage from detention or delay. For his time and expenses in continuing his journey beyond Social Circle, no recovery can be had, for the reason that they are too remote. After reaching the destination to which the company was bound to convey him, his cause of action against the company, both as to time and money, was complete, and his recovery now should be the same as if the action had been commenced at that moment. If his damages were still accruing as he travelled on down the railroad upon foot one mile beyond Social Circle, and continued to accrue through the day's journey until he arrived at Madison, and still continued after he left the railroad at Madison and went through the country to where he lodged for the night, and then ran on till he reached his mother's house next day, we see not what would have stopped them had his final destination been New York or Boston, and he had gone there on foot before ceasing to run up the damages. Whether a common carrier shall pay more or less damages for failing to carry a passenger to a way station on its line, cannot depend as a general rule on what occurs to the passenger after he passes that station. If the company makes him whole for what he has lost by delay and otherwise up to the time of reaching there, this is

enough. Subsequent losses are amongst the contingencies of life, which each man must bear for himself.

6. As to inconvenience and physical hardship, compensation for these should be denied altogether if they were needlessly incurred; and they were needlessly incurred, in part at least, if the plaintiff and his brother could have reached Social Circle by waiting at Conyers or Covington for the next train, or if, with the means at their command, they could have procured conveyance and spared themselves the fatigue and exposure of proceeding on foot to Social Circle. *Morse v. Duncan*, 14 Fed. Rep. 396, 8 Am. & Eng. R. R. Cases, 374; *C. R. I. & P. R'y v. Brisbane*, 24 Mo. Ap. 467. By walking voluntarily they could not entitle themselves to recover of the company more than it would have cost them to ride. And the same may be said as to the alleged injury to the plaintiff's health. If his health would not have suffered had he not walked, and if he was not obliged to walk in order to reach Social Circle, but chose to do so rather than spend his money, he can recover nothing for injury to his health. *I. B. & W. R'y v. Birney*, 71 Ill. 391; *Francis v. St. Louis Co.*, 5 Mo. Ap. 7; *C. R. I & P. R'y v. Brisbane*, *supra*; *Railroad Co. v. Fleming*, 14 Lea, 154. The line of distinction between these cases and such as *Int. G. N. R'y v. Terry*, 62 Tex. 380, 50 Am. Rep. 529, and *Spicer v. L. & B. Railroad*, 149 Mass. 207, is very broad. With inconvenience, hardship, or hurt to his health, originating after the plaintiff left Social Circle, no matter what method of travel he adopted, the company would have no concern. Such remote incidents of his expulsion from the train at Conyers, in violation of a duty to convey him to Social Circle but no further, would be too contingent to enter into the computation of his damages. Code, §§3071-3.

7. Compensation for wounded feelings and to redress

any indignity offered the plaintiff whilst upon the train as a passenger, is for estimation by the jury; but not only the literal facts in evidence, but their actual effect on the emotions should be regarded. What degree of mortification or humiliation was consciously experienced by the plaintiff? Was he cast down and made ashamed? What is the explanation of his not being silent on the subject after leaving the train, instead of calling attention to his grievance by a random remark in the hearing of the conductor and others who might chance to be within the sound of his voice? These are questions to be considered.

8. Punitive damages may be awarded in such a case if the jury think proper to allow them, but should be graduated with reference to the special circumstances. Amongst these circumstances is the singular fact that before leaving the train, the plaintiff did not protest or remonstrate with the conductor against being denied his rights as a passenger. He made no distinct objection to leaving the train. Indeed, he must have seemed to the conductor to leave it hurriedly and almost willingly; and the remark that it was hard to be put off and be compelled to pay one's fare, could well have been understood as a speech to cover retreat with a thin drapery of plaintive words after an unsuccessful attempt to *beat* the railroad out of a ride on imaginary tickets. This construction would have been unjust but might have been adopted by the conductor without any intention to do injustice. We have studied the evidence carefully, and it suggests as a probable theory that, after the misunderstanding arose between the passenger and the conductor, the passenger was not as helpful as he might have been in freeing the conductor from his mistake, and that he was less intent upon reaching Social Circle by that train than upon having a good case against the company. If this is a true

theory, it ought to bar punitive damages altogether. It may or may not be true.

A new trial, however, is ordered upon the one ground only, that of the excluded evidence.

*Judgment reversed.*

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SUTTON *et al.* v. GUNN.

1. The plaintiff in an attachment for purchase money may entitle himself to a general judgment against the defendant by giving notice as prescribed in section 3309 of the code.
2. The city court of Macon being invested by statute with power to hear, determine and give judgment in all civil cases of which it has jurisdiction, unless a trial by jury is demanded, a judgment rendered by the judge without a jury in an attachment case, though the foundation of the attachment be a conditional note, is valid where due notice has been given of the proceedings and there is no appearance, plea or demand for a jury trial. Although the letter of the statute requires the demand to be made on the first day of the term to which the case is returnable, this does not bind the defendant to make the demand before he is served with notice, but he will be allowed to make it afterwards, where the object is to obtain a general judgment against him.
- (a) Demand as a condition of trial by jury is constitutional.
3. Process need not be annexed to a declaration in attachment; notice as required by the statute will suffice.
4. The declaration is in time if filed on the last day of the first term.
5. Illiteracy of a defendant in attachment is no excuse for not knowing the contents of a written notice and making defence in due time.

February 23, 1891. By two Justices.

Attachment. Notice. Demand. Judgment. Constitutional law. Process. Practice. Before Judge HARRIS. City court of Macon. June term, 1890.

The error assigned is, that the city court overruled the motion of Edward and Emily Sutton to set aside a verdict and judgment in attachment in favor of Gunn against them, the motion being upon the grounds that the verdict was rendered by the judge of the court to which the attachment was returnable, upon a conditional contract, without a jury; that there was no verdict to sup-

86	652
88	797
86	652
95	450
86	652
110	306

86	652
128	65

port the judgment; that the attachment was sworn out March 20, 1889, and the declaration not filed until June 29, 1889; that defendants were never served with a copy of the declaration; that there was no process to the declaration; and that the judgment should be vacated so far as it affects Emily Sutton, because she had a good defence, to wit, that she signed the note sued upon as security for her husband, Edward, and she has never had her day in court, being unable to read the notice served on her and being informed and believing that the cause would be for trial in October, at which time she appeared at court to learn when it would be for trial and was informed it had been tried, and she never appeared and pleaded to the attachment and the property attached was never replevied.

The attachment was sued out March 20, 1889, returnable to the June term, 1889, of the city court, and was levied upon a horse in possession of Edward Sutton, which horse (defendants not having replevied it) was sold on March 30, 1889, under order of court upon Gunn's application reciting that the defendants had been served with notice of his intention so to apply. On June 29, 1889, Gunn filed his declaration alleging indebtedness to him by defendants upon a promissory note, and the issuing and the levy of the attachment, and praying for a judgment for the sale of the property levied upon and for general judgment. The note sued upon was given to Gunn by defendants, and by its terms defendants jointly and severally promised to pay Gunn on or before twelve months from its date, October 28, 1888, \$125 with interest at a specified rate, agreeing to pay at least \$10 a month on the note, "and failing either monthly payment then makes the whole note due." No process was attached to the declaration. On August 28, 1889, defendants were each served personally with a notice that the attachment cause was pend-

ing in the city court, returnable to the June term, 1889; that under the attachment the horse had been seized and sold; that at the return term plaintiff had filed his declaration on the attachment, setting forth the indebtedness of defendants on the note, a copy of which was attached to the notice; and that at the September term of the court, ten days or more from date, at such time as the cause might be set, plaintiff proposed to take a general judgment against defendants. At the September term the judge, without a jury, found in favor of plaintiff for the principal and interest of the note, to be paid out of the proceeds of the sale of the property, and to be collected out of the property of defendants, and that judgment issue in favor of plaintiff against defendants for the full amount sued for. This finding recited that it was shown to the court that the suit was upon "an conditional (?) contract in writing and upon an attachment levied upon one medium-sized bay horse, and that the defendants have seized bay horse, and that the defendants have been duly notified of the filing of the declaration in attachment." Upon this finding, on September 24, 1889, general judgment was entered against defendants, and special judgment against the attached property. It was admitted that the defendants had never appeared and pleaded, and that the property attached had not been replevied.

H. F. STROHECKER, by brief, for plaintiff in error.

HARDEMAN & NOTTINGHAM, by B. M. DAVIS, *contra*.

BLECKLEY, Chief Justice.

1. The law of attachment for purchase money is the same as the general law of attachment, except in certain particulars, such as the grounds upon which the writ is issued and the property on which it is to be levied, Code, §3296. That a general judgment can be recovered in such a case, where there is voluntary appearance by the defendant, followed by pleading, is held

in *Joseph v. Stein*, 52 Ga. 332. Also, where the property has been replevied. *Camp v. Cahn*, 53 Ga. 558. In the present case there was neither appearance nor replevy, but there was written notice given more than ten days before final judgment, which, according to section 3309 of the code, has the same effect upon the plaintiff's right to a general judgment. It may therefore be affirmed that the plaintiff in an attachment for purchase money may, by giving the defendant the notice prescribed in the code, obtain a general judgment for the amount of his debt.

2. The judgment was rendered by the city court of Macon without a jury. There could be no question of the power to do this, if the contract declared upon was an unconditional contract in writing. Constitution, art. 6, sec. 4, par. 7; Code, §5145. *Juchter v. Boehm*, 63 Ga. 71; *Dortic v. Lockwood*, 61 Ga. 293. As to other contracts, the power depends upon the statute creating the city court of Macon, and the application of that statute to a case like this. It declares that "The judge of the said city court shall have power and authority to determine all civil causes of which the said court has jurisdiction and to give judgment and execution therein; provided always, that either party in any cause shall be entitled to a trial by jury in said court, upon entering a demand therefor by himself or his attorney in writing on or before the call of the docket the first day of the term of said court at the term to which the cause is returnable, in all cases where such party is entitled to a trial by jury under the constitution and laws of this State." Acts 1884-5, p. 473. The attachment was returnable to the June term; but up to that time it had been served as an attachment only. The notice required as a foundation for a general judgment had not been given, and of course it was not obligatory upon the defendants to demand a trial by jury upon the first



day of that term, so far as any general judgment to be afterwards rendered was concerned. It may be that such a demand would have been necessary to make it incumbent upon the court to submit the case to a jury before rendering a special judgment binding only on the property attached. It is obvious that the case, as a complete proceeding for a general judgment, did not exist till the notice was served. That service took place on August 28th, and this was only a few days before the beginning of the second term, that term being fixed by law to commence on the first Monday in September. Were the defendants bound to make their demand for a jury on the first day of that term? We think not. Ordinary process from the city court of Macon is required to be served the same length of time as process from the superior court, that is 15 days before the term to which the case is returnable. As to ordinary cases the provision relative to the time of demand would be reasonable, and the time afforded ample. But it cannot be held that these defendants lost their right to trial by jury by failure to make a demand on the first day of the September term. The statute contains no express provision for a demand at any time after the first day of a term. It, however, invests the court with power to try and render judgment in all civil cases unless a jury is demanded. The *time* for making demands is fixed with reference to ordinary actions, but is not applicable to such a case as this, because the notice was not served prior to the term to which the case was returnable. The provision as to *demand*, however, is applicable to this as well as to other cases. On account of the special circumstances, the rule of the statute as to time could not and would not be enforced, but that is no reason for dispensing with demand altogether. Had a jury been demanded, even at the time of trial, which was September 24th, the demand could have

been acceded to, but there was no demand made at any time, and for that reason the right to a jury trial was not violated. The court was not called on for a jury trial. Indeed, no defence whatever was filed; there was no issue for a jury to try; nothing was to be established but the truth of the plaintiff's declaration; the case was in default. Even where a mode of affirmative waiver is prescribed, a trial by jury may be waived in civil cases in other ways. "The clause in the constitution that the right to a jury trial in civil cases may be waived in the manner to be prescribed by law, has not been regarded as precluding courts from holding parties to have waived by their conduct or silence the right to a jury trial, upon general principles of law applicable to the subject, although the case is not provided for by any statute." *Baird v. Mayor*, 74 N. Y. 383. The statute touching the city court of Macon treats all parties to civil cases, whether plaintiffs or defendants, as waiving the right unless they demand it. No affirmative act by a party to a pending cause is required to set the trying functions of the court in motion, but an affirmative act is required to put a jury in motion. Under such a system every party is presumed to desire his case tried by the court if he fails to signify that he wishes a jury. Surely this is imposing a very mild condition. It is a reasonable regulation. *Garrison v. Hollins*, 2 Lea, 684; *Lawrence v. Born*, 86 Pa. St. 225; *Foster v. Morse*, 132 Mass. 354; *Cooley Const. Lim*, 6 ed. 505. Much more onerous terms might be exacted by statute without infringing upon the constitutional sacredness of trial by jury. *Flint River Steamboat Co. v. Foster*, 5 Ga. 194.

3. Neither by law nor the course of practice in this State is it needful to attach any process to a declaration in attachment. We have never heard of any such thing being done. There is no provision for issuing or

serving it. The due service of notice is all that is required in attachment cases to subject the defendant to be proceeded against for the obtainment of a general judgment. Code, §3309.

4. The declaration must be filed at the first term. Such is the requirement of the statute. Code, §3308. It may be filed on any day within the term. Such is the construction given to a similar statute in Illinois. *Lawyer v. Langhans*, 85 Ill. 138. We can have no doubt that filing on the last day of that term was sufficient.

5. The suggestion in the amended motion that one of the defendants had a good defence, to wit, that she signed the note as security for her husband, and that being unable to read the notice served on her, she was informed and believed that the case would be for trial in October, furnishes no cause for vacating the judgment. Her illiteracy will not excuse her from using due diligence to ascertain correctly the contents of the notice. Her misinformation was not caused by any act or omission of the adverse party, and she, like all other suitors, must abide by the legal consequences of regular procedure in a pending action. Her own negligent ignorance or mistake is no ground of relief. *Lawton v. Branch*, 62 Ga. 350.

The city court did not err in overruling the motion to set aside the judgment. *Judgment affirmed.*

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HOPKINS v. THE CENTRAL RAILROAD CO., and *vice versa*.

Practice in Supreme Court.

BLECKLEY, C. J.—These cases are controlled by the act of November 11, 1889, which prescribes the manner of taking cases to the Supreme Court, and declares this manner the exclusive one after January 1, 1890. *Writs of error dismissed.*

February 23, 1891. By two Justices.

C. C. DUNCAN and L. F. GARRARD, for plaintiff.

R. F. LYON, for defendant.

## FRANKE v. MAY.

There is no authority of law for handing to opposing counsel original papers, such as petition for *certiorari*, sanction of the same and the writ of *certiorari*, the proper custodian of which is the clerk of the superior court, and afterwards treating such delivery of original papers as a substitute for the written notice required by statute of the sanction of the writ and of the time and place of hearing.

February 23, 1891. By two Justices.

*Certiorari*. Notice. Practice. Before Judge MILLER. Bibb superior court. April term, 1890.

The *certiorari* was dismissed upon the ground that written notice of the sanction of the writ and of the time and place of hearing had not been given to the defendant in *certiorari* or her attorney; and the exception is to this ruling, and further, that the judge below erred in refusing to order a new trial to be had in the court of ordinary, from which court the case was taken by *certiorari*, inasmuch as it appeared that the judge of that court, before whom the case was tried, had died before answering the writ of *certiorari* served upon him. It appeared that the case was tried at the November term, 1888, of the court of ordinary of Bibb county. On December 20, 1888, the petition for *certiorari* was sanctioned by the judge of the superior court, and on December 24, 1888, writ of *certiorari* was issued and served upon the judge of the court of ordinary, requiring him to answer to the term of the superior court to be held on the first Monday in May, 1889; that before the return term of the writ, on April 9, 1889, the ordinary had died without making answer; that before his death deponent gave to the attorney for the defendant in *certiorari* the original papers, showing in writing the sanction of the writ and the time and place of hearing, which papers were in the last named attorney's office at the death of the ordinary and on the day the su-

86	659
113	610
86	659
121	92

perior court convened, May 6, 1889; and that thus defendant in *certiorari* had ten days notice of the sanction of the writ and time and place of hearing; the return term of the superior court beginning on May 6, 1889, the case being sounded in order, from the docket of that court, on July 12, 1890.

S. A. REID, for plaintiff in error.

LANIER & ANDERSON, *contra*.

BLECKLEY, Chief Justice.

The requirement of the statute as to notice is, that "The plaintiff in *certiorari* shall cause written notice to be given to the opposite party in interest, his agent or attorney, of the sanction of the writ of *certiorari*, and also the time and place of hearing, at least ten days before the sitting of the court to which the same shall be returnable, and in default of such notice (unless prevented by unavoidable cause) the *certiorari* shall be dismissed." Code, §4059. How this statute has generally been construed and administered may be seen by reference to the following cases, besides others. *Granade v. Wood*, 84 Ga. 120; *Glenn v. Shearer*, 44 Ga. 16; *Bryans v. Mabry*, 72 Ga. 208; *Southern Express Co. v. Wheeler. Id.* 210; *McAlister v. The State*, 77 Ga. 599. The general spirit of the cases is, that the mandate of the statute, "the *certiorari* shall be dismissed," is not to be disobeyed where there has been a failure to give the written notice required. A decision, not by a full court, in *Milam v. Sproull*, 36 Ga. 398, gives some countenance to a disregard of this imperative mandate upon the theory that the special facts of that case amounted to a substantial compliance with the statute. These special facts were: First, that while the superior court was in session, the judge from the bench informed the attorney for defendant in *certiorari* that a writ had been applied for, and the attorney objected to granting it because the exceptions signed by the inferior court

were not produced, saying that he was entitled to their production as matter of right. Thereupon the judge refused to sanction the writ until the exceptions were produced; they were produced, and the writ was granted during the term. Secondly, the application for and sanction of the writ was recited in a bill for injunction which was afterwards brought by the plaintiff against the defendant in *certiorari*, and this bill, it would seem, was served on the defendant. Putting these things together, the court held them sufficient notice and a substantial compliance with the requirements of the statute. We need not approve or disapprove this ruling, for no such facts appear in the present case. What is relied on here as a substitute for the statutory notice is, that after the sanction and issuing of the writ, all the original papers appertaining to the case were handed by the plaintiff's attorney to the defendant's attorney; that this was done more than ten days before the sitting of the court to which the writ was returnable, and that defendant's attorney had the custody of the papers for a long time afterwards. All this was in parol, and the delivery seems, from a memorandum made by the plaintiff's counsel on the same day, to have taken place "on street between Hunt's drug-store and First National Bank." If actual knowledge of the matter would suffice, and if parol evidence could be used to prove such knowledge, it is undoubtedly established; but the statute requires written notice, and doubtless it means what it says. The proper custodian of these papers was the clerk of the superior court. They were office papers, and there was no legal right to use them out of the office by passing them from hand to hand as a substitute for a written notice required by law to be given. It would be strange if a use of these papers which, tested by the general law applicable to office papers, was, to say the least of it,

irregular, could be deemed a compliance with so strict and exacting a statute respecting notice as that which we are considering. It could as easily be held that if a sheriff delivers the original declaration and process to the defendant, and leaves them in his possession until the appearance term of the case, that would dispense with service or a waiver of service. It can be seen that at the bottom of this question is something that touches public policy, as well as compliance with the terms of a particular statute. It is not sound policy to allow parties to withdraw from the proper custody the papers of a court and employ them in functions appropriate to private papers only.

The court committed no error in dismissing the *certiorari* at the hearing because the statutory notice had not been given. For the lack of such notice, there was no proper case pending in the court. *Toole v. Davenport*, 63 Ga. 160. The death of the ordinary before answering the writ was not a relevant fact on the motion to dismiss.

*Judgment affirmed.*

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O'PRY v. KENNEDY.

1. Though by section 3646 of the code a sheriff who has levied an execution upon heavy machinery, such as a planing-machine, is authorized to sell it without removing it from the premises where it is seized and conveying it to the place of sale, this does not relieve him from the duty of maintaining his custody and possession of such property until he disposes of it by a legal sale. If through the omission of due care and diligence he loses control of the property and for that reason fails to sell it, he is answerable to the plaintiff in execution for its value, or for the amount of the execution if less than its value.
2. Where a rule *nisi* against the sheriff recites a levy upon personal property by virtue of an execution particularly described, the principal, interest and cost being specified, and requires the sheriff to show cause why he has not made the money and why the rule should not be made absolute and an attachment issued against him, this is a virtual though an indirect allegation that the plain-

86	662
115	839

86	662
119	61

tiff has sustained damage to the full amount of the execution by the sheriff's default. If, without objecting by demurrer or otherwise to the certainty or directness of the allegation, the sheriff answers the rule, admitting the levy and justifying his failure to sell, but not suggesting that the value of the property was less than the amount of the debt, the sufficiency of the property to pay the debt is by implication admitted. The justification set up in the answer being traversed, and the issue being found by a jury against the sheriff, he stood convicted of making a false answer, and after such verdict there was no abuse of discretion by the court in granting a rule absolute corresponding in amount to the specifications in the rule *nisi*.

3. If a party has two defences, one going to the whole cause of action, the other to a part only, he must set up both before verdict. After the sheriff's answer alleging matters of fact in justification of his failure to sell property has been traversed, the traverse tried and a verdict rendered on that issue, he is not entitled to amend his answer by alleging that the property was only of a certain value, or of less value than the amount of the execution.
4. A person ruled in the superior court as a deputy-sheriff of the county cannot raise the question of his official character after he has answered the rule and a verdict has been rendered against him upon a traverse of his answer.
5. The rule *nisi* for attachment may be embraced in the original rule to show cause which precedes the rule absolute fixing liability upon the officer to pay the money.

February 23, 1891. By two Justices.

Rule against sheriff. Execution. Practice. Amendment. Before Judge MILLER. Bibb superior court. April term, 1890.

A rule *nisi* from the superior court, issued on November 22, 1889, against O'Pry as deputy-sheriff of Bibb county, having been served upon him, he made answer which was traversed, and upon the hearing the jury found the following verdict: "We, the jury, find for the plaintiff." The attorney for plaintiff in *fi. fa.* moved to enter judgment on the verdict, and pending that motion the attorney for O'Pry asked leave to amend his answer. The motion was refused, which refusal is one of the errors assigned. O'Pry then offered a number of objections to the rendition of the judgment moved for, which objections were overruled,



and to this action of the court error is assigned. The court then rendered the judgment, to which also error is assigned.

The petition of Kennedy for the rule *nisi* alleged that in September, 1884, he obtained in Burke county court a judgment against J. E. Hill for a certain named sum; that execution was issued and sent to Camp, an attorney of Bibb county; that early in 1886, Camp placed the execution in the hands of O'Pry, deputy-sheriff of Bibb county, and pointed out to him certain personal property to be levied on; that the levy was made and sale duly advertised by O'Pry about May or June, 1886; that the execution has been in the hands of O'Pry a sufficient time for him to have made the money due on it, and he has not done so and fails to account to Kennedy for the property and refuses to deliver up the execution, though Kennedy has demanded both. He prayed for a rule *nisi* requiring O'Pry to show cause why he had not made the money on the execution and why the rule should not be made absolute and an attachment issue. O'Pry answered that the *fi. fa.* was placed by Camp in his hands as deputy-sheriff, with instructions to levy it on a planing-machine; that he made the levy, reported it to Camp, and told him the machine was heavy and difficult and expensive to move, and if Camp desired him as sheriff to take charge of it, he would do it if furnished with the money to pay for hauling it; whereupon Camp directed him to let it stay where it was until the day of sale, and he replied, if that was done he would not be responsible if the machine should be moved by any one so as not to be there on sale day, and Camp told him he would not be held responsible if it were removed; that under this statement of Camp, respondent permitted it to remain where it was when levied on, and under direction of Camp, advertised it for sale to be

delivered at said place, stating that it was heavy, difficult and expensive to move; that before the day of sale he was informed it had been moved by some one, and searched for it, but could not find it; that after the day of sale he heard that it had been moved to another county, and so told Camp, who said he would send the *fi. fa.* down there and have it again levied on, but Camp never made any demand for the *fi. fa.*, nor has petitioner nor any one for him ever done so; that they could have had it at any time by paying him his costs; that defendant in *fi. fa.* does not live in Bibb county, has not lived there since the *fi. fa.* was given to respondent, nor has he ever had any property there since that time. The material matters in this answer were traversed, and the jury found as above stated. The amendment proposed after verdict was, that the *fi. fa.* has been "this day" delivered up to plaintiff's attorneys; that the property levied upon was not worth and would not have brought at the sale more than \$75; that in the effort to realize on the *fi. fa.* the defendant was acting as deputy-sheriff of the city court of Macon, which was the only office he held during that period; that the execution issued from the county court of Burke county, and hence the superior court of Bibb county had no jurisdiction either of the subject-matter or of defendant personally, but such jurisdiction was in the city court and county court. The judgment proposed to be taken and which was finally rendered was, that O'Pry pay to plaintiff in execution, within ten days, the amount of the execution, and pay the costs of this proceeding, or in default be attached for contempt. The objections to the rendition of this judgment were, that there were no pleadings that authorized any judgment against defendant, and the pleadings were vague and uncertain; that no damage is averred in the petition, no allegation made that he could have made the

money due on the *fi. fa.*, and no value placed on the property levied upon; that the verdict is vague and uncertain, and no legal judgment could be entered upon it; that no attachment *nisi* has ever issued, and no attachment absolute was prayed for in the petition or found in the verdict; that defendant was not a deputy-sheriff of the county, but was of the city court of Macon, and the superior court had no jurisdiction to rule him on a *fi. fa.* from Burke county court, and no jurisdiction of person or subject-matter; that the facts as found by the jury and those untraversed in the answer did not authorize any attachment; and that the property levied on was heavy and cumbersome, and defendant was not required by law to move it.

HARDEMAN & NOTTINGHAM, for plaintiff in error.

STEED & WIMBERLY, *contra*.

BLECKLEY, Chief Justice.

1. The code, §3646, declares that where any sheriff shall levy an execution upon articles difficult and expensive to transport, he may sell the property without carrying to and exposing the same at the court-house door on the day of sale. The levy in this case being made upon a planing-machine, the officer was relieved by this statute from the duty of having the machine present at the time and place of sale. But there is no hint in the statute of any purpose to excuse him for not keeping the property in his possession or under his control. It was removed before the day of sale without his knowledge or consent, but there is no suggestion that the plaintiff in execution or his attorney was in any way connected with the act of removal. The duty and risk of preventing removal rested upon the officer; the machine was in his legal custody, and if, through his omission of due care and diligence, he lost control of it and for that reason failed to sell it, he is answerable

to the plaintiff for its value, or for the amount of the execution if the amount is less than such value.

2. The rule *nisi* described the execution, specified the principal, interest and cost, recited a levy upon personal property and required the officer as deputy-sheriff of Bibb county to show cause why he had not made the money, and why the rule should not be made absolute and attachment issued against him. This was a virtual, though an indirect, allegation that the plaintiff had sustained damage to the full amount of the execution, by the officer's default. No objection by demurrer or otherwise, for the want of certainty or directness in its allegations, was made to the rule. The officer answered it, admitting the levy and justifying his failure to sell, but not suggesting that the value of the property was less than the amount of the execution. The plaintiff traversed a material part of the justification set up in the answer, the traverse was tried by a jury and a verdict was rendered in favor of the plaintiff. After all this it was too late to object to the terms of the rule as uncertain in any material respect. *Brannon v. Central Bank*, 18 Ga. 361. The rule afforded fair notice that the plaintiff sought a rule absolute for the whole debt recited, and the sole defence presented by the answer was that the only property accessible to the officer at any time was the planing-machine which he had seized, and that he was in no fault for not selling it. He set up various facts and circumstances to justify his failure to sell, but did not allege that the machine was of less value than the amount of the execution, or of what value it was. He made no question and tendered no issue on that subject. By failing to do so, he virtually admitted that he had no excuse for not realizing the money due on the execution except that presented, namely that without his fault the property seized was not brought to sale. If it was worth less than the

amount of the execution, that, together with the fact that there was no other property, would have been a defence to the rule as to all excess of the execution over and above the value of the machine. But he could not offer a false defence to the whole rule and keep back a true defence to a part of it. If he had both a false and a true defence, one going to the whole cause of action and the other to a part, he should have presented both together, if he intended to rely upon both. By electing to rely upon one alone, he waived the other. After a verdict was rendered against him on the traverse of his answer, he stood convicted of making a false return to the rule *nisi*, and there was certainly no abuse of discretion by the court in making the rule absolute for the whole amount of the execution. It may be that the court, had it been so disposed, could, as mere grace and indulgence, have inquired further into the facts before passing final judgment, but there was no legal obligation resting upon it to do so.

3. We have already said that, if a party has two defences, one going to the whole cause of action the other to a part only, he must present both together. This he can do by adding one to the other at any stage, so long as the facts of the case are open for trial. But unless there is to be more than one trial in one and the same case, the right of amendment, so far as alleging any facts is concerned, must be limited by the rendition of a verdict final in its nature. The court did not err in declining to allow the officer to amend his answer by alleging that the machine was only of a certain value which was less than the amount of the execution. This allegation could have been traversed, and if traversed, another trial would have been necessary. After an adverse verdict on the matter of this amendment, a second amendment might have been offered, and so on indefinitely. Unless the first trial and verdict are to

terminate the pleadings on the facts in controversy, the altercations of the parties may go on without limit.

4. Nor was it error to refuse to allow the officer after verdict to raise the question, by amendment to his answer or otherwise, as to his official relation to the superior court and its jurisdiction over him. By the act organizing the city court of Macon, the sheriff of Bibb county is made *ex officio* sheriff of the city court, and is given power to appoint a deputy or deputies, with the consent of the judge of that court. Acts of 1884-5, p. 472. It may be that a deputy so appointed is not *de jure* a deputy-sheriff of Bibb county. But whether so or not, after he has acted as such and responded to a rule against him brought in that character, and a verdict has been rendered upon a traverse of his answer, it is altogether too late for him to remember for the first time that he is not a deputy-sheriff of the county, but only of the city court.

5. That a rule *nisi* for attachment may be embraced in the original rule *nisi* and need not be repeated after a rule absolute has been granted, is well settled. *Smith v. McLendon*, 59 Ga. 523; *Wheeler v. Thomas*, 57 Ga. 161; *Brannon v. Central Bank*, 18 Ga. 361.

*Judgment affirmed.*

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HOWLAND v. BARTLETT *et al.*

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1. Where the same substantial facts affect equally the claims of three clients, that the attorney has settled with one to avoid being ruled, is evidence for the others on a rule brought by them. It is not excluded under §3789 of the code as an admission made by constraint or with a view to a compromise.
2. Unless requested, the court need not charge the jury specially as to the effect of a receipt in full.
3. The evidence being conflicting, the case is within the general rule of upholding verdicts where the trial judge is satisfied.

February 23, 1891. By two Justices.

Attorney and client. Evidence. Charge of court. Verdict. Before Judge MILLER. Bibb superior court. November term, 1890.

On the trial of a rule brought by W. T. Bartlett and Mrs. S. E. Long against J. C. Howland as an attorney at law, the following facts appeared: He was employed by W. T. Bartlett, for himself and his sisters, Mrs. Long and Mrs. Jennings, to bring suit in Sumter county to recover their interest in certain land there, they claiming such interest under the will of Abner Bartlett, probated August 25th, 1848. Howland filed a petition for partition, which was resisted by C. L. Bartlett, executor of Sarah A. Dickenson, a daughter of Abner Bartlett, setting up that the property passed to her in fee under the will, and making various other questions for decision by the court. The judgment was, that the property was to be equally divided between Howland's clients and C. L. Bartlett, and a sale of the property by commissioners was ordered, half of the fund thereby raised to be paid to Howland as attorney, after paying expenses. On July 10th, 1886, having recovered the money, he rendered to the plaintiffs a statement showing the amount for which the property was sold and the expenses allowed by the court, making the half received by him as attorney for the plaintiffs \$621.37. From this he deducted a fee for himself of \$150, a fee paid to associate and resident counsel of \$25, railroad fare \$8.60, hotel expense \$7.50, and expense of will \$3.35; leaving to be divided among the three plaintiffs \$426.92, one third of which he paid to each one of them. W. T. Bartlett gave him a receipt in full for his third; but the other plaintiffs refused to give receipts because of the fees and expenses charged. In the following November, Howland collected a small balance that was due for rent of the property, which he paid to the plaintiffs, Mrs. Long giving him a receipt for \$5.50

of the amount "in full for balance due from moneys received from the Bartlett-Dickenson place in Americus, Ga." W. T. Bartlett testified that the terms of the contract between himself and Howland were, that Howland was to receive \$75 and his expenses; that when he first approached Howland to employ him, he said he would charge a reasonable fee not exceeding \$75; that the expense was not to be paid in advance, nor was any part of the fee to be paid in advance, and if Howland failed in recovery, he would not have been entitled to any fee at all or any part of the expense; that on presentation of Howland's statement, witness refused to acquiesce in his charges for fees of himself and associate counsel, claiming that all counsel fees should not have exceeded \$75; that Howland proposed to him to pay him so much of the money, saying it made no difference if his sisters got but little, and refused to pay him any part of the recovery unless he would agree to the fee charged, and he therefore accepted the amount tendered and gave the receipt in full; that before the recovery, Howland said he thought he might recover for each one fourth of the whole estate; and that at the last term of court, witness was in Macon on the day this cause was set for trial, but did not go to the court-house until after the suit had been dismissed on account of his failure to do so, and on the case being reinstated, he was subpœnaed by Bayne (counsel for plaintiffs) as a witness. Mrs. Long testified that she did not know anything of the contract with Howland as to fees except what she learned from W. T. Bartlett, and knew of no contract her husband had made with Howland; that when, in November, Howland paid her her share of the sum he had collected for rent, he presented the receipt which she signed, but which she thought only referred to the rent; and that she did not say to him that she had reconsidered and inquired about



the correctness of his former charge and was satisfied it was all right. Theodore Jennings testified that, some time after his wife received from Howland the amount he admitted to be due, witness and Bayne went to see Howland, who told them to go to Cicero Tharpe (Howland's father-in-law) and he would pay them the amount; and that they called on Tharpe, who paid them \$41.60.

Howland testified as follows: W. T. Bartlett came to him representing that he (Bartlett) and his sisters claimed a fourth interest in Mrs. Dickenson's estate in Sumter county, and desired to employ defendant to recover their interest; also that the property was in the hands of Bartlett, executor, who denied that they had any interest, but if so, it was only one fourth. Upon this representation he agreed with W. T. Bartlett to take the case for \$75, half of which was to be paid at once, and his expenses. In addition to this, he was to have the right to associate additional counsel at a reasonable fee to be paid out of the recovery. Shortly afterwards the husband of Mrs. Long came to defendant and said his wife was unable and unwilling to pay her part of the fees in advance, and that they were doubtful of making recovery; and proposed to give defendant \$150 and all his expenses if he would agree that he would make it conditional on recovery; and defendant agreed to this. (This was denied by Long, who testified that he had gone to see Howland during this litigation but not about that matter; and that Howland wanted some money to grease the wheel, but he told Howland that he was charging enough, \$75, and he would not pay him.) After this, W. T. Bartlett had a conversation with defendant and Cicero Tharpe, and said he was willing to pay his part as agreed in the original contract, but that his sisters were unwilling; and proposed to change the fee of \$75 certain to \$150 conditional. (This was corroborated by Tharpe and

denied by W. T. Bartlett.) After this discussion, defendant concluded that his clients were entitled to a half instead of a fourth-interest, and made application accordingly. Bartlett, executor, *et al.* employed Judge Willis Hawkins to represent them, and claimed the whole fund under the will, or at all events that plaintiffs were entitled to only a fourth-interest. Defendant employed B. P. Hollis as associate counsel, agreeing to a fee of \$50. At the termination of the litigation, Hollis was made one of the commissioners to sell the property and divide the money, and received fees as commissioner, and on this account abated his fee to \$25. Defendant went to Americus three times on this cause, and incurred the expenses charged by him; and as soon as the money from the litigation came into his hands, he at once notified his clients, and they came for a settlement. Bartlett demurred to the fee to Hollis, and told defendant that he thought defendant ought to abate the fee because he had so little trouble in winding it up, but conceded that it was correct under the contract. He took his *pro rata*, gave the receipt in full, and had never demanded any further sum; and defendant did not tell him (as he had testified) that unless he got said receipt he would not pay him anything. W. T. Bartlett did not question that the fees charged were in accordance with the contract, but claimed that they ought to be let off with less because the case had been wound up without much trouble to defendant, who claimed that that should not be, as he had recovered twice as much as he had been engaged to sue for. When Mrs. Long and Mrs. Jennings came, they said they did not understand the contract as defendant had them charged, and declined to give a receipt in full. Defendant paid them the amount he admitted, and referred them to W. T. Bartlett and Cicero Tharpe as to the correctness of said charge. When the balance on rent was collected, Mrs.

Long said she had examined into the correctness of these former charges and found they were correct, and she was ready to give a receipt in full; and the receipt as taken was then written, and she then understood its terms; but Mrs. Jennings still refused to agree to said charges. After this, Bayne and Jennings came to defendant and said they wanted to examine the papers, Bayne informing defendant that he had been employed to rule him. Defendant, not desiring any litigation, referred them to Cicero Tharpe, who was present at the contract and knew its conditions. He did not authorize them to collect anything from Tharpe; simply referred them to him for information. The fee of \$150 and expenses was a reasonable fee for the services rendered. Defendant never proposed to Bartlett to pay him more than his legal share, but told him his sisters ought to pay him something for his extra trouble. No demand had been made upon him for money since the settlement and taking of receipt.

Cicero Tharpe testified that Bayne came to him, and informed him that Howland had sent him there as he had advised the fee, and Bayne so told him with the request that he pay him for Mrs. Jennings \$41.60; that witness was indignant, pulled out the money and paid him; and that he would have paid it if it had been \$500, as Mrs. Jennings was a cousin of Howland's wife.

The jury found for each of the plaintiffs \$25, and \$3.20 interest from July 10th, 1886. The defendant moved for a new trial on the following grounds:

(1-5) Verdict contrary to law and evidence.

(6) The plaintiffs brought out part of the conversation as to Tharpe's saying he advised this fee, and the defendant offered the following part in the testimony of Tharpe, the refusal by the court to allow which is assigned as error: "In the conversation I told you that I advised this fee. I said also I had a conversation

with Judge Hawkins, who was counsel on the other side, and who said that Howland's fees were richly worth \$200; that he had won on the trial of said cause much more than he was entitled to."

(7) Error in failing to charge as to the effect of the receipts given by the plaintiffs, as evidence, though this had been an issue argued by counsel for both sides.

(8) Error in allowing the testimony that Tharpe had paid to Bayne the \$41.60, over objection that it was impertinent, irrelevant and misleading to the jury.

The motion was overruled, and defendant excepted.

HARDEMAN & DAVIS, for plaintiff in error.

M. G. BAYNE, by brief, *contra*.

BLECKLEY, Chief Justice.

1. An attorney having collected a fund in which three clients were jointly and equally interested, upon a rule brought against him by two of them, evidence was admissible in favor of the movants that he paid to the third a sum almost equal to that now claimed of him by each of the other two. A payment made by a designated individual at his request would count for the same as if made directly by himself. Yielding to the demand of a client to avoid being ruled for the money does not make the transaction incompetent evidence, under section 3789 of the code, as an admission made by constraint or with a view to a compromise.

2. The ordinary effect of receipts in full given by clients to their attorney is not so likely to be misapprehended by the jury as to require the court to charge specially on that subject without any request to do so.

3. The evidence being conflicting, and the result depending chiefly upon the credibility of the witnesses, the discretion of the court below in refusing a new trial will not be controlled. Nothing appears to take this case out of the general rule. *Judgment affirmed.*

THE CHATTANOOGA, ROME AND COLUMBUS RAILROAD  
COMPANY v. JACKSON.

1. Amendment of a declaration against the Chattanooga, Rome & Carrollton Railroad Company by substituting "Columbus" for "Carrollton" so as to give the defendant its proper corporate name, was not adding a new party but simply correcting a misnomer.
2. After the allowance of the amendment, it was not error to require the defendant to go to trial, its counsel not stating that they were less prepared for trial, nor giving any reason why the trial should not proceed except that a new party had been entered as to which this was the appearance term, and it appearing from the record that the defendant's counsel recognized that the true defendant had been sued and served, by acknowledging service on its behalf and filing pleas of abatement in its name.
3. While the judge might have resorted alone to the statutes of Tennessee, and the decisions of its Supreme Court it was not error to receive, in addition to those statutes and decisions, the testimony of skilled attorneys who practiced in the courts of that State, to aid him in arriving at a proper conclusion as to what was the law of that State, and especially as to the practice of the courts thereof in regard to appeals and their dismissal.
4. In Tennessee, an appeal from a justice's court to the circuit court does not merely suspend, but vacates, the judgment; and the dismissal of an appeal in vacation was unauthorized and had no effect. Where the appellant at the succeeding term of the circuit court took an order making the dismissal the judgment of that court and affirming the judgment of the justice's court, and then the appellee, by order of the circuit court, dismissed his case against the appellant, the latter order was irregular but not void, and must be construed to revoke or annul the former. The exercise of the jurisdiction may have been suspended upon the dismissal of the appeal, but the jurisdiction itself was not suspended but was retained by the court until the case was finally disposed of.
  - (a) Though it does not appear by the record that any notice was given to the appellant of the action of the court in thus resuming its jurisdiction, it will be presumed that, according to the practice of the court, no such notice was necessary, or that if necessary, it was in fact given.
  - (b) Though it appears that after the dismissal of his case by the appellee, the amount awarded to him in the justice's court was paid into the clerk's office of the circuit court, it does not appear that the appellee ever received the money, nor that the clerk was the proper person to receive it.

5. The pendency of a prior suit in one State cannot be pleaded in abatement of a suit between the same parties for the same cause in a court of another State.
6. The discretion of the judge in overruling the ground for new trial that the verdict was contrary to law and evidence, was not abused.

February 23, 1891. By two Justices.

Railroads. Amendment. Parties. Practice. Evidence. Pleadings. Abatement. Judgments. Jurisdiction. Notice. *Lis pendens*. New trial. Before Judge MADDOX. Walker superior court. February term, 1890.

To the report contained in the decision it is only necessary to add that under the plea of the general issue the testimony for the plaintiff tended to show the following: While he was returning home from Chattanooga he had to cross the railroad at a public crossing, then drive along the road and cross the railroad again at another public crossing a short distance from the first. There was a private road along the side of the railroad from which he first had to cross, extending to that portion of the public road which he reached by crossing the railroad the second time, but on account of its condition it was not practicable for him to use it. The second crossing was defective in that there were no planks laid to facilitate the passage of vehicles over the railroad track, and because the space between the ties outside the rails, and up to the rails, had not been filled with dirt or in any other way, and because the public road and railroad did not cross at right angles but at quite an acute angle, so that the wheels of vehicles, in attempting to cross, were likely to slide along the rails. As plaintiff was attempting to go over this second crossing with his wagon and was nearly off the track, the defendants' train, which was behind time and running at a speed of from thirty to forty miles per hour, no signal having been given before it approached the crossing, struck the wagon. The train approached

through a cut, which prevented plaintiff from seeing it earlier, and prevented him from being seen from it until he was on the crossing. When he did see it his team was right on the track and his wagon slipping along the rail, and when he saw it he whipped his team, and as they went over the railroad the train came "like a streak" and struck the hind wheel of the wagon and knocked plaintiff and his son out. If the track had been properly fixed, plaintiff would have got across without injury. He was bruised, cut and mashed in many places; suffered great pain; was confined to the house about a month, and since the injury has continued to suffer pain and been able to do but little work; can scarcely get up a hill at all, but can plow a little on a level; cannot do more than a fourth of a day's work; before the injury he could do as much work as anybody; his physician's bill was \$100; and probably his injuries are to some extent permanent. The speed of the train was not checked in approaching the crossing, and there were no blow-posts near the crossing. When plaintiff recovered consciousness the train was standing across the wagon road. When he approached the railroad he did not stop to listen to see if the train was coming, but drove right on. His wagon was making a noise; it was in August and the wagon was dry; he was traveling on a gravelly road, and had two empty whisky barrels, a sack of flour and a quart bottle of whisky in the wagon. He had not taken over two tablespoonfuls of liquor that day, and was sober. He was sixty-five years old.

The defendant introduced no testimony. The jury found for the plaintiff \$2,000.

DABNEY & FOUCHÉ, F. W. COPELAND, W. W. BROOKES and W. T. TURNBULL, for plaintiff in error.

PAYNE & WALKER, *contra*.

SIMMONS, Justice.

Jackson brought his action against the Chattanooga, Rome and Carrollton Railroad Company, for damages sustained by him by reason of personal injuries inflicted upon him by the negligence of the company. This action was brought to the February term, 1889, of Walker superior court. At that term the defendant filed a plea in abatement, alleging, in substance, that the plaintiff should not have and maintain this action, because on the 18th of January, 1889, he began his action against the defendant in a justice's court in the State of Tennessee, for \$200, for injuries to a minor son, and that on February 20th, 1889, a judgment was rendered against the defendant in said action, and on the 25th of February, 1889, the defendant paid off and discharged the judgment; and that said suit in Tennessee was for the same cause of action set up in this suit. Defendant afterwards amended this plea by alleging that said suit in Tennessee was still pending. When the case came on for trial at the February term, 1890, in Walker superior court, the plaintiff proposed to amend his declaration by striking out the word "Carrollton" in the name of the company, and inserting in lieu thereof the word "Columbus," so that the defendant's name would read, the "Chattanooga, Rome and Columbus Railroad Company." To this the defendant objected, on the ground that the proposed amendment introduced a new party. The objection was overruled, and the defendant excepted. The defendant objected to going to trial, on the ground that it had just been made a party and that it was then the appearance term. The objection was overruled, and the defendant excepted. The case then went to trial without the intervention of a jury, on the plea in abatement. Upon the trial of the issue made on this plea, the plaintiff offered the interrogatories of Lewis Shepard and John A. Moon,



practicing attorneys in the courts of Tennessee, for the purpose of showing what the rules of practice were in Tennessee, and also to show the effect of the orders, judgments and decrees of the circuit courts of that State, and the law of that State on the subject of pleading in justices' courts and the dismissal of appeals therefrom; to all of which evidence the defendant objected, on the ground that the statutes of Tennessee and the decisions of its Supreme Court are the highest and best evidence of its laws. This objection was overruled; and the court, after hearing the evidence on the plea, found against the defendant, and the defendant excepted. The case was then tried upon its merits before a jury, and a verdict was rendered against the defendant. The defendant thereupon made a motion for a new trial, on the several grounds contained therein, which was overruled by the court, and it excepted. Error is assigned in the bill of exceptions on each of the above rulings.

1. There was no error in allowing the plaintiff to amend his declaration by substituting the word "Columbus" for the word "Carrollton," so as to give the defendant its proper corporate name. It was not adding a new party, but simply correcting a misnomer. This, under our code, §3483, the plaintiff had the right to do *instantly*. *Johnson v. Central Railroad*, 74 Ga. 397.

2. There was no error in requiring the defendant to go to trial after this amendment was allowed. Counsel did not state to the court that they were less prepared for trial on account of this amendment, nor give any other reason why the trial should not proceed, except that a new party had been added and that it was the appearance term as to it. Besides, it appears from the record that service was acknowledged on the writ by counsel, on behalf of the "Chattanooga & Columbus Railway Co."; and in the plea filed in abatement the

case was stated as "*Jackson v. Chattanooga, Rome and Columbus Railroad Company*," showing that counsel for the defendant recognized that the true defendant had been sued and served.

3. The next exception relates to the admission, over objection, of the testimony of Shepard and Moon. It will be remembered that this testimony was offered not only to prove the law of Tennessee on the subject of appeals and their dismissal, but also to prove the practice in the circuit courts in regard to such matters. Our code, §3824, declares: "The public laws of the United States and of the several States thereof, as published by authority, shall be judicially recognized without proof." While, therefore, the trial judge might have resorted to the statutes and the decisions of the Supreme Court of Tennessee, we cannot say that it was error to receive the testimony of skilled attorneys who practiced in the courts of that State, to aid him in arriving at a proper conclusion as to what was the law of the State, and especially as to the practice of the courts thereof in regard to appeals and their dismissal. The testimony was not for the jury, but for the information of the judge; and he was not bound by the opinions of these attorneys, but it was his duty at last to decide the law himself, aided by these opinions and by such other sources of information as were accessible to him. Knowing as we do the great difficulty under which courts labor in arriving at the true law of a case, and especially the difficulty encountered here as well as by the court below in this case, we cannot condemn a trial judge for resorting to any sources of information which will aid him in coming to a correct conclusion as to the law. The record shows that the judge in this case did not confine himself to the opinions of the attorneys, but that the statutes of Tennessee and the decisions of its Supreme Court were read to him. More-

over, in some States that have no statute like our own above quoted (Code, §3824), evidence of this kind is the proper mode of proving the law of another State; and the Supreme Court of the United States has so held. *Hanley v. Donoghue*, 116 U. S. 1; *Chicago & Alton Railroad v. Wiggins Ferry Co.*, 119 U. S. 615.

4. The next exception complains that the court erred in finding for the plaintiff on the plea in abatement. It will be remembered that the plea in abatement was filed at the February term, 1889, and alleged that the plaintiff had already recovered a judgment upon the same cause of action in the State of Tennessee and that the judgment had been paid off and discharged. The evidence on the trial of this plea, a year after the filing of the plea, showed that instead of the judgment having been paid off and discharged, the defendant, on the 20th of February, five days before the plea was filed, had appealed from the justice's court to the circuit court, and on the 9th of March thereafter, in vacation, dismissed the appeal; and on the 6th of May thereafter, moved in the circuit court to enter the dismissal of record, and took an order in open court, as follows: "It appearing to the court that the defendant is entitled to make said dismissal a matter of record in this court, it is therefore considered by the court that said appeal be and the same is dismissed, and the judgment of the justice's court is affirmed." This order appears to have been entered on the records of the circuit court. The evidence further showed that on the same day and after the defendant had dismissed its appeal, the plaintiff dismissed his case against the defendant, by order of the same court; and that on June 30th thereafter, the amount recovered by the plaintiff against the defendant was paid into the clerk's office of the circuit court; but the record fails to disclose that the plaintiff ever received the money, nor was there any evidence going to show

that the clerk was the proper party to receive it. The dismissal of the appeal in vacation was unauthorized by the laws of Tennessee and had no effect. Such we have ascertained is the rule in that State. In Tennessee, an appeal from a justice's court to the circuit court does not merely suspend the judgment as it does in this State, but vacates it. *Furber v. Carter*, 34 Tenn. 3. When, therefore, the appeal was entered, the judgment of the justice's court was vacated; and under this law and the above state of facts, the court did not err in finding against the plea.

But it is argued by counsel for the plaintiff in error that when the company dismissed its appeal on the 9th of March, in vacation, and took an order in open court on the 6th of May thereafter, making the dismissal the judgment of the circuit court and affirming the judgment of the justice of the peace, the judgment of the justice's court became final; and that the court below in the present case erred in not so holding. Counsel for the defendant in error replies to this by showing the subsequent order wherein he dismissed in the circuit court the case he had brought in the justice's court and which the railroad company had carried up by appeal. But counsel for the railroad company contend that this order was void and should not have been construed to have any effect, because when the company dismissed its appeal and the judge of the circuit court by his order affirmed the judgment of the justice's court, there was no case in the circuit court to dismiss. It will be seen, therefore, that the present case, upon this point, turned on the question whether the order of the Tennessee circuit court dismissing the case was void, or was simply an irregularity and erroneous. If it was void, Jackson, the plaintiff, when this case came up in the court below, had already a final judgment of the courts of Tennessee against the defendant, upon the same cause of ac-

tion; but if the order dismissing the case was simply irregular, each of the parties was bound by it until revoked or reversed on appeal or writ of error. After much reflection, we have come to the conclusion that the order dismissing the case from the circuit court was not void, but was merely irregular and erroneous. "By the common law a judgment might be altered, revised, revoked or amended at any time during the term at which it was rendered." 12 Am. & Eng. Ency. of L. 120. "A court may vacate its judgment at any time during the term at which it was rendered, even though the steps for taking an appeal have been perfected." *Id.* 126. See also 1 Am. & Eng. Ency. of L. 627, and authorities cited, note 15; 1 Black Judgments, §305; 1 Freem. Judgments, §69. There was no question made but that the court which rendered the judgment had jurisdiction of the subject-matter and the parties. Having this jurisdiction, it had the right at any time during that term to annul, revoke, change or amend any judgment which it had previously rendered. While the latter judgment dismissing the case does not allude to the former judgment dismissing the appeal and affirming the judgment of the justice's court, yet to give it effect it must necessarily be construed to revoke or annul the first judgment and to reinstate the case. The court having acquired full jurisdiction of the case, it retained it until the case was finally disposed of. The exercise of the jurisdiction may have been suspended upon the dismissal of the appeal, but the jurisdiction itself was not suspended. "When therefore a court which still retains jurisdiction but has suspended the exercise of it, assumes again to exercise its jurisdiction, its action is within its power and cannot be collaterally impeached." 2 Black Judgments, §912; *Anderson v. Excelsior Co.*, 27 N. Y. 216; *Loeb v. Willis*, 3 N. E. Rep. 177, 100 N. Y. 231; *Blun v. Wettermark*, 58 Tex. 125.

While it would have been the better practice to revoke in terms the first order dismissing the appeal, we think the granting of the second order dismissing the case was a revocation of the first by indirection. 1 Black Judgments, §304. For instance, when a trial is had, a verdict rendered and a judgment entered thereon, and a motion for a new trial is made and granted, the granting of the motion sets aside the judgment by indirection.

It was also contended that the order was void because there was no notice given the railroad company of the application for or the granting of the second order. In reply to this it is said in 2 Black Judgments, §912, that "where in the case of a foreign judgment it does not appear by the record that any notice was given to the party affected by the action of the court in thus resuming its jurisdiction, it will be presumed that according to the practice of the court, no such notice was necessary, or that if necessary, it was in fact given."

5. The last and remaining ground to be considered, as made in the bill of exceptions, is that the court erred in finding against the plea of pendency of the former suit in the Tennessee court. There was no error in this finding by the court. It is well settled that "The pendency of a prior suit in one State cannot be plead in abatement of a suit between the same parties for the same cause in a court of another State." Bennett on *Lis Pendens*, §347. See also Whart. on Conflict of Laws, §784 *et seq.*; Story on Conflict of Laws, 833, note; 8 Am. & Eng. Enc. of Law, 554; Smith v. Lathrop, 44 Pa. St. 326, s. c. 3 Am. Law Reg. 107; West v. McConnell, 25 Am. Dec. 191, and note.

6. The only ground of the motion for a new trial insisted upon here was the 3d ground thereof, which is that the verdict is contrary to evidence, etc. It is claimed in support of this ground of the motion that

the evidence shows that the plaintiff in the court below was negligent and could have avoided the injury to himself by the exercise of ordinary care. We presume that the court submitted this question fairly to the jury, and the jury having found against the railroad company on that issue, and there being sufficient evidence to authorize their finding, and the trial judge being satisfied therewith, he did not abuse his discretion in refusing a new trial on this ground. *Judgment affirmed.*

### THE CENTRAL RAILROAD & BANKING CO. v. SKELLIE *et al.*

1. The main issue being whether or not a through contract of shipment to New York was made by the shipper and the carrier, it was error so to charge the jury as to take from them the consideration of that question, and substantially to instruct them that, whether a through contract was made or not, the carrier was liable under the common law, if it failed to ship the goods to New York within a reasonable time. If there was no such contract, the carrier's duty was to deliver the goods in good order at either of its *termini* to the connecting carrier in due time, upon which delivery its liability ceased. If such contract was made, and the carrier failed to deliver the goods in New York within a reasonable time, and the goods were thereby damaged, the shipper was entitled to recover such damages as he sustained from the unreasonable delay, whether the shipment was to be made by one route or another.
2. On the question whether the shipper made the contract with the carrier to ship the goods by a certain route, his testimony wherein he stated what experience he had in shipping such goods, and that the route indicated was a better way of shipping them, was admissible.
3. Testimony of the shipper as to certain sayings of the carrier's agent who represented it in the shipment, was admissible in rebuttal of the testimony of that agent as to a conversation which he had with the shipper on the night after the carrier had failed to forward the goods from the initial point. The agent's admissions, when applied to by the shipper and upon demand being made for the reasons of the carrier's non-compliance with the contract claimed to have been made, the transaction being still in progress, and any representations made by the agent under these circumstances, were admissible against the carrier; especially where the agent telegraphed to the shipper to come to see him in regard to the matter.

86	686
90	686
86	686
99	761
86	686
107	371
86	686
110	413
86	686
126	463

4. A witness who had been in the business of shipping fruit to New York for fifteen or twenty years and received from dealers in that city daily quotations by telegrams and circulars, as well as accounts of sales of fruit which he shipped, could testify, from returns of sales of fruit shipped by himself at a certain time, as to the market value of such fruit in New York at that time.
  5. So the testimony of one who was a resident of New York and a dealer in fruit, and who sold the fruit in question, was admissible.
  6. It would not be a correct rule for the measure of damages to say that "the plaintiffs are entitled to recover only what they paid for the peaches, such other loss as the proof shows that they sustained in consequence of such failure incurred in and about the loading, the superintending or loading, less what they have realized from the sale; not the profits that may have been realized from the sale in New York, in case the instructions had been followed and the fruit delivered earlier in New York."
- (a) Questions for new trial indicated.

February 23, 1891. By two Justices.

Carriers. Contracts. Charge of court. Evidence. Practice. Before Judge HARRIS. City court of Macon. June term, 1890.

Reported in the decision.

R. F. LYON, for plaintiff in error.

ROSS & ANDERSON, *contra*.

SIMMONS, Justice.

Skellie, Lowe and Everett sued the railroad company for damages. They alleged in their petition, in substance, that they made a contract with the railroad company to ship a car-load of peaches from Summerfield on the line of defendant's road to Savannah, Ga., and thence by steamer to New York; that the railroad company sent a car from Macon to Summerfield on Saturday, and they were to load it with peaches by Monday afternoon at four o'clock, when the through-freight which passed Summerfield on its way to Savannah at that hour was to stop, take up the car and carry it to Savannah in time for the next day's steamer to New York; that the car was loaded by the hour agreed upon, but the defendant failed to stop its train and



take said car to Savannah as it had agreed to do; that they soon thereafter notified the agent of the defendant in Macon of the failure of the through-freight to take up said car, and also notified him that the peaches would thereafter be at the risk of the company; that the agent of the defendant then agreed to ship said car by rail to New York, and promised that it would arrive there by rail as early as it would have done, if it had been carried to Savannah and thence to New York by steamer; this they consented to, but informed the agent that it would be at the company's risk, that they would not release it from any damage which they might sustain by reason of its non-compliance with the original contract. They further alleged that if the company had complied with the original contract, the peaches would have arrived in New York on Thursday, the 27th of June, and that on that day said peaches were worth in that market from \$5.50 to \$6.00 per bushel; that instead of the peaches arriving on Thursday the 27th, as promised by the agent, on account of the negligent delays of the company and its agents they did not arrive until Saturday the 29th, too late to be placed on the market of that day; that on account of said negligent delays the peaches were badly damaged and were not worth more than \$1.80 per bushel; that on account of this damage to the peaches, caused by the negligence of the company, the plaintiffs were damaged \$914.50. The defendant denied that it made any contract with the plaintiffs to ship the car-load of peaches to New York; that its only contract was to furnish them a car and carry it to Summerfield; that nothing was said by the plaintiffs as to where the car was to go or when it was to go; it also denied that it made any contract or agreement with them to forward the car by all rail route from Summerfield to New York, but only agreed to forward it to Atlanta, the terminus

of its road. Both sides sustained their allegations by testimony, and the evidence was conflicting on every material point.

1. Upon this state of the pleadings and evidence, the court, at the request of counsel for plaintiffs, instructed the jury that "if the jury should find that there was no contract upon the subject of these peaches, then the liability of the defendant would depend upon the common law, which is to forward all freight within a reasonable time and without unreasonable delay, and on failure to do that, then the liability would be as stated by counsel, that is the difference between the price of the peaches in a damaged condition and the price which they would have brought if there had been no unreasonable delay and if they had been sold upon that day; that would be the difference." The main question in this case, as we have shown by our statement of the pleadings, was whether a through contract of shipment had been made between the parties or not, the one party claiming that they had made such a contract and the other denying it. This charge, therefore, took the consideration of that question from the jury and instructed them, in substance, whether a through contract had been made or not, that the railroad company was liable under the common law, if it failed to ship these peaches to New York within a reasonable time. We do not understand the law to be as stated by the trial judge. If there was no contract for delivery of the goods in the city of New York, as claimed by the railroad company, then its common law liability would be to deliver the peaches in good order at either of its *termini* to the connecting carrier, within a reasonable time. It could deliver them either at Savannah to the Ocean Steamship Company, or at Atlanta to a connecting railroad company, and if it delivered them at either place in good order and in due

time, then its liability ceased. If, however, there was a contract by the railroad company to deliver the peaches in New York and it failed to do so within a reasonable time and the peaches were damaged thereby, the shippers would be entitled to recover such damages as they sustained from the unreasonable delay. And this would be true, whether the shipment was to be made by way of Savannah or by way of Atlanta. We think, therefore, that the exception made to the charge in the 13th ground, as above set out, was well-taken, and entitles the plaintiff in error to a new trial, because the main issue made by the pleadings was taken from the jury by this charge.

2. As to the admissibility of certain evidence which was objected to before the trial court and admitted, it is perhaps necessary for us to express an opinion, as doubtless the same evidence will be offered on the next trial. We do not think it was error to admit the evidence of Everett wherein he stated what experience he had had in shipping peaches, which is complained of in the first ground of the motion. That evidence would likely throw light upon the question whether he made the contract with the agent of the company to ship the peaches by way of Savannah and thence by the steamer, because he testified that experience taught him that that was a better way of shipping peaches than by all rail route, as they were not jostled or jolted so much. Everett insisting in his testimony that he made the contract to ship by steamer, and the agent denying it, this evidence might throw some light upon the question before the jury.

3. The plaintiff in error also complains in the 2d and 16th grounds of the motion that the court erred in admitting the testimony of Skellie as to certain sayings of Englerth, the agent of the company, on the ground that they were declarations of the agent about a past

transaction, and were not admissible as part of the *res gestæ*, and were not admissible for the purpose of impeaching the testimony of Englerth. The record discloses the fact that the defendant company had sued out interrogatories for Englerth, agent, and had asked him about the conversation which he had with Skellie the night after the company had failed to bring the car away from Summerfield. This testimony of Skellie seems to have been in rebuttal of the answers given by Englerth to his interrogatories, and seems to us to have been admissible for that purpose. It was admissible to contradict Englerth's testimony in regard to the conversation between him and Skellie on that occasion. It was claimed, however, in the argument by counsel for the plaintiff in error, that it was inadmissible on the ground that Englerth was simply the agent of the company, and any admissions that he might make in regard to transactions which were past, were inadmissible. That is generally true, but under the circumstances of this case we think the agent's admissions were admissible, when applied to by the other party and a demand made upon him for the reasons of the non-compliance by the company with the contract which he had made. We think that any representations made by him under these circumstances would be admissible against the company. The shippers claim that the agent had promised to stop the down freight at four o'clock in the afternoon and take up this car-load of peaches and carry it to Savannah. The train did not stop and take it up, and they demanded to know of the agent why it did not do so. The transaction was not closed but was in progress, and anything that the agent said in answer to this demand, we think would be admissible. And this is especially so when it appears that the agent telegraphed to Skellie at Fort Valley to come to Macon for the purpose of seeing him in regard to the matter. As

Englerth represented the company in the shipment of this freight, he was the proper person to apply to for an explanation of the delay. In giving such an explanation, he would be acting in the line of his duty and within the scope of his authority. Furthermore, according to the plaintiff's theory, the transaction undertaken by the company was to get the peaches to New York, and this can hardly be said to have been completed before the car was moved. Ample authority shows that the agent's admission was properly received in evidence. *Kirkstall Brewing Co. v. Furness R'y Co.*, L. R. 9 Q. B. 468; *McCotter v. Hooker*, 8 N. Y. 501; *Curtis v. Avon, etc. R. R. Co.*, 49 Barb. 148; *Pier-son v. Atlantic Nat'l Bank*, 77 N. Y. 304; *Morse v. Conn. River R. R.*, 6 Gray, 450; *Lane v. Boston, etc. R. R. Co.*, 112 Mass. 455; *Green v. Boston, etc. R. R. Co.*, 128 Mass. 221; *Baltimore & O. R. R. Co. v. Camp- bell*, 36 Ohio St. 659. This holding does not conflict with that in *Evans v. Atlanta & W. P. R. R. Co.*, 56 Ga. 498, where there was no proof that the agent had any authority or that it was any of his business to make the indorsement which was offered in evidence. The same distinction may be made against the case of *Great W. R'y Co. v. Willis*, 18 C. B. (N. S.) 748. See *Kirkstall Brewing Co. v. Furness R'y Co.*, *supra*.

4. The 4th ground complains that the court erred in admitting certain answers of Rumph to interrogatories propounded to him. Rumph was asked what the price of Rivers peaches was in New York on the 27th and 28th of June, 1889. He answered that they sold in New York on those days at \$4 for three-quarter bushel carriers. He also answered that he sold Rivers peaches on the 28th for \$4 for three-quarter bushel carriers, and that they were shipped by ice-car to Savannah, thence by refrigerator on steamer to New York. On his cross-examination he said he was not in New York on or

about that time, he could not swear what the market value of Rivers peaches was at that time, only by account of sales with check to balance. It also appeared in his testimony that he had been in the business of shipping fruit to New York for fifteen or twenty years, and that in the fruit season he received daily quotations from dealers in New York by telegrams and circulars, and received accounts of sales of fruit which he had shipped. This testimony was objected to upon the ground that it was hearsay, that the witness could not testify from his own knowledge, but only from hearsay. We have given considerable time to the consideration of this question, and find the authorities hold that the testimony is admissible. Wharton says: "As value, in its business sense, consists largely of the opinion of persons familiar with a market, and as these opinions are made up in a measure of what is said by others, hearsay is a primary evidence of value. In proving value, therefore, it is admissible to resort to hearsay." 1 Whart. Ev. §255. The same is true of market value, so that "it is no objection to the evidence of a witness testifying as to market value that such evidence rests on hearsay." *Id.* §449. Direct testimony as to market value is in the nature of opinion evidence, and necessarily rests upon hearsay. Any one possessing sufficient knowledge or information may express his opinion. It seems that the witness need not be an expert or a dealer in the articles in question, but may testify as to their market value if he has had ample opportunity for forming a correct opinion. *Thatcher v. Kaucher*, 2 Col. 698; *Lush v. Druse*, 4 Wend. 313. But where the witness is a dealer in the things whose market value is in question and has had special opportunities for forming a correct opinion, his testimony is admissible as expert evidence. *Lawson on Expert Ev.* 439; *Alfonso v. United States*, 2 Story, 421. The fact

that the witness resides at a distance from the market, makes no difference, provided he becomes acquainted in the course of business with the market value of which he speaks. Indeed, we could find no case holding that a dealer in certain articles, who received daily quotations from and made sales in a distant city, could not testify as to the market value of those articles at that place, although he was not a resident thereof and was not there at the time inquired about. The large majority of authorities put the admissibility of such evidence upon the ground that the witness is an expert, because of being a dealer in the articles and receiving quotations or reports in the regular course of business from dealers in the distant place. *Alfonso v. United States*, *supra*; *Brackett v. Edgerton*, 14 Minn. 174; *Laurent v. Vaughn*, 30 Vt. 90; *Whitney v. Thacher*, 117 Mass. 523. See, also, *Draper v. Saxton*, 118 Mass. 428; *Noonan v. Illsley*, 22 Wis. 27; *Fennerstein's Champagne*, 3 Wal. 145; *Clicquot's Champagne*, *Id.* 114; *United States v. Champagne*, 1 Ben. 241. Other authorities hold that, while it is hearsay testimony, it is admissible under an exception to the general rule excluding hearsay, as in cases of pedigree, etc. *Smith v. N. C. R. R. Co.*, 68 N. C. 107. But whether it is hearsay or expert testimony, they all agree in holding it admissible.

5. Of course, if this testimony of Rumph, who was not a resident of New York, was admissible, the testimony of Durling, who was a resident of that city and a dealer in fruit and who sold these peaches, was likewise admissible. This disposes of the third ground of the motion wherein it is claimed that the court erred in admitting Durling's testimony.

6. The 15th ground of the motion complains that the court erred in refusing the request of the company to charge as follows: "In case they, the jury, should

be of the opinion that the defendant received instructions from the plaintiffs as to the time when the car was to be shipped or forwarded from the place at which it was loaded with peaches, and the route over which it was to be forwarded, and the defendant failed to carry out such instructions, and the plaintiffs sustained loss in consequence, then the plaintiffs are entitled to recover only what they paid for the peaches, such other loss as the proof shows that they sustained in consequence of such failure incurred in and about the loading, the superintending or loading, less what they have realized from the sale; not the profits that may have been realized from the sale in New York, in case the instructions had been followed and the fruit delivered earlier in New York." There was no error in refusing to give this charge. Under the facts of this case, it was not the correct rule for the measure of damages, in case the plaintiffs were entitled to recover.

These questions which we have noticed are the only material ones in this motion for a new trial. The others seem to us immaterial, and if there be any errors in the other charges complained of, or in refusals to charge certain requests, they will doubtless be corrected upon another hearing. We think the questions to be tried by the jury in this case are: (1) Did the plaintiffs in the court below make a through contract with defendant to ship these peaches to Savannah and thence by steamer to New York? If they did and defendant failed to perform its contract, and the plaintiffs were injured thereby, they would be entitled to recover. (2) Did they make a new contract to ship by the all rail route to New York? If they made such a new contract and the defendant damaged them by an unreasonable delay on the route, they would still be entitled to recover such damages as they may have sustained by reason of the delay. If they made no new contract, but



insisted upon their first contract and simply assented to the shipment by the all rail route for the benefit of the railroad company, then they still can recover on the original contract. Of course, if no through contract was made for shipment, they cannot recover at all under these pleadings. *Judgment reversed.*

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GLASS v. STEADMAN.

A declaration filed on March 8, 1889, alleged that the defendant farmed in her own name, but for some previous years her husband operated the farm, plaintiff furnishing to it supplies which were paid for out of the crops raised on it; that when the husband quit running the farm for himself and it was run by the wife, the plaintiff was given no notice thereof and had no knowledge of the change; that the husband continued to buy supplies for the farm, and the plaintiff believed he was the person running it as before, and charged the supplies usually furnished, amounting, after deducting credits, to the sum appearing by an itemized account attached; that the plaintiff sued the husband on this account and in November, 1887, recovered judgment from which execution issued and was levied on personalty purchased with the proceeds of the crop raised said year; that this personalty was claimed by the defendant, and on the trial of the claim in April, 1888, both she and her husband testified that in said year she carried on the farming business and the crops belonged to her alone; and that this was the first notice the plaintiff had that the husband was not acting for himself but for the wife in making the purchase, and that she received the benefit of it. *Held*, that no cause of action was set out.

February 23, 1891. By two Justices.

Actions. Husband and wife. Pleadings. Before Judge GOBER. Houston superior court. April term, 1890.

For the facts see the head-note.

W. C. WINSLOW and HARDEMAN & DAVIS, for plaintiff.  
C. C. DUNCAN, for defendant.

SIMMONS, Justice.

Under the allegations in this declaration, there was no error in sustaining the demurrer thereto. The dec-

laration alleges that the credit was given to E. B. Steadman, that he was sued to judgment thereon, and that an execution issued and was levied upon certain property which was claimed by Mrs. Steadman. It is not alleged that E. B. Steadman was insolvent, but, on the contrary, we can infer from the allegations in the declaration that he was solvent, because it is alleged that he paid for all supplies furnished him up to that particular year. Nor does the declaration allege that the property levied upon and claimed by Mrs. Steadman was not found subject to the execution. The only reason given for the liability of Mrs. Steadman is that E. B. Steadman purchased supplies as her agent, and that the plaintiff did not know this until the trial of the claim case. Under the facts alleged, and the lack of other allegations in the declaration, this was not sufficient to make Mrs. Steadman liable for the account sued on, especially after such a lapse of time after the credit was given.

*Judgment affirmed.*

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GRACE v. KEZAR.

86	697
87	703
86	697
96	221

Where land was levied on and advertised for sale before an application by the defendant in execution for a homestead therein, and was sold pending the application and subject thereto, with notice given at the time and place and before the sale, the purchaser became the owner of the fee, and after the expiration of the homestead estate he was entitled to the possession, and the land could not be again sold under another execution against the same defendant.

February 23, 1891. By two Justices.

Homestead. Levy and sale. Estates. Before Judge GOBER. Houston superior court. April term, 1890.

Claim was interposed by Kezar to land levied on under execution in favor of Grace against Smith. The judge, to whom the case was submitted on the facts stated in the opinion, held the property not subject, and the plaintiff excepted.

C. C. DUNCAN, for plaintiff.

R. N. HOLTZCLAW, for claimant.

SIMMONS, Justice.

Under the facts of this case, the court did not err in finding the property not subject. The land was levied on and advertised for sale by the sheriff before Smith made application for a homestead. It was sold by the sheriff, subject to this homestead, after the application was made, but before it was approved by the ordinary. The deed made by the sheriff to Kezar, the purchaser, recited that the land was "levied on and sold as the property of Patrick Smith, subject to the homestead of said Patrick Smith then pending, of which notice was given at the time and place and before the sale." The fee and the use of the land were still in Smith at the time of the sale. There was no law to prevent the sheriff from selling the land before the application for homestead was approved, and the sale was not, therefore, void, as contended by counsel for the plaintiff in error. When the application was approved, the fee would have remained in Smith had not the land been sold prior thereto, but the law would have taken from him the use of the land and vested it in his family. Kezar having purchased the fee before the application of Smith was approved, and having purchased subject to the encumbrance of the homestead, was deprived of the use of the land so long as the homestead existed. When the homestead expired by the death of the beneficiaries, however, Kezar was then entitled, not only to the fee, but to the possession of the land, and the court was therefore right in holding that it could not be again sold under an execution against Smith in favor of the plaintiff in error.

*Judgment affirmed.*

## PHILLIPS v. THE TROWBRIDGE FURNITURE COMPANY.

86 699  
92 597

1. On the issue whether the defendant was a partner, testimony of the plaintiff's agent that the person claimed to be the other partner stated, not in the presence of the defendant, that the defendant was going in with him and would furnish security to the amount of \$1,000, was not admissible.
2. The person claimed to be partner with the defendant executed an instrument as follows: "In consideration of the sum of five dollars to me paid and a debt of seven hundred and nine dollars I owe to the Trowbridge Furniture Company, . . . I hereby transfer, sell, assign and deliver to said Trowbridge Furniture Company all the stock of furniture now in my store, . . . being furniture bought by me from said company, and also all the furniture which I have bargained to sell on the installment plan to parties who now hold said furniture under written contracts held by me from them, with right in said Trowbridge Furniture Company to hold the same contracts over said furniture so bargained to be sold and the said contracts taken therefor, that I have or could have had. The proceeds of the sale of said furniture and the collection of said contracts shall be applied towards the payment of said above mentioned debt as far as the net proceeds thereof may go, less \$50 which is to be credited to the rent of said store, and less such commissions as may be allowed me . . . for my services in selling said furniture and collecting said contracts. It is agreed that the mortgage against Mrs. C. J. Phillips is not to be commenced to be foreclosed before the 1st day of October next, being a mortgage given by her to secure above mentioned debt. This August 7th, 1888." *Held*, that this was not a bill of sale and delivery of the goods thereunder in payment of the debt, but was a written title to the property to secure the plaintiff for the purchase price of the furniture which had been sold to the maker of the instrument, and a written assignment of the contracts therein referred to. It could be legally given though there was a partnership, and the giver could agree to its cancellation; nor would the other partner be thereby injured. If she were not a partner, but a security, and the cancellation were without her consent, she would be released to the extent she was thereby damaged.
3. Requests to charge based on an erroneous construction of the instrument were properly refused.
4. If the original of a contract of sale on installments, used in the business, or a certified copy of the record of the same, were not obtainable, perhaps a blank form of the same might be admissible; but without proper foundation for its introduction, such form was properly excluded.

5. So the original books of the business should be tendered or accounted for, before secondary evidence of their contents can be admitted.

February 23, 1891. By two Justices.

Partnership. Evidence. Title. Principal and surety. Before Judge MILLER. Bibb superior court. April term, 1890.

The Trowbridge Furniture Company brought its bill against C. A. Neal and Mrs. Phillips, for the foreclosure of a mortgage alleged to have been given it by Mrs. Phillips to secure a credit for certain goods sold to Neal, it being alleged that Neal and Mrs. Phillips were partuers at the time of the transactions in question. Mrs. Phillips answered, asserting that she was merely a surety for Neal, was never in partnership with him, but was interested in a portion of the net profits of his business; that the indebtedness in question had been discharged by a sale which Neal made to complainant of his stock of merchandise and notes of sufficient value to extinguish the debt; and that after such purchase the complainant entrusted the goods and notes to Neal, thereby increasing her risk as a surety and discharging her.

The evidence showed that complainant sold goods to Neal who offered Mrs. Phillips as his security, and took a mortgage for \$1,000 from Mrs. Phillips to secure it for Neal's purchases. Neal stated, not in her presence, that she was going in business with him and would furnish security to the amount of \$1,000. The sales by the company to Neal amounted in value to only \$709.60. As to the extent of the interest of Mrs. Phillips in the business, the testimony for her tended to show that, beyond furnishing the security, she was only interested to the extent of one third of the profits and was not a partner; while there was testimony for the complainant tending to show that she was interested as a partner. Some time after the goods

were sold to Neal, complainant tried to get a settlement from him, and finally agreed to take from him the instrument set forth in the second head-note. After it was made, actual possession was not taken by the complainant, but it allowed Neal to remain in possession, and its testimony tended to show that no sales were made from the stock or collections made under the contracts referred to; while the testimony for defendant tended to show that after the execution of the instrument, and before its rescission, Neal did make sales. After it was executed, Mrs. Phillips objected either to it or to the goods being turned over to Neal, and there was entered upon it a written rescission, signed by the complainant, by its treasurer, and by Neal, reciting that the "bill of sale" had been made without consulting Mrs. Phillips, who claimed an interest in the profits of the business; and she objecting to the "bill of sale," it was agreed by both parties thereto that it was cancelled, and title to the property and effects transferred to Neal, in the same manner and interest in which he held the same before he executed the "bill of sale."

The verdict was in favor of the complainant against Neal and Mrs. Phillips for \$709.60 and interest, and for foreclosure of the mortgage. Mrs. Phillips moved for a new trial; her motion was overruled, and she excepted. One of her grounds was, that the court erred in charging that the legal effect of the paper in question was a mere attempt to create a lien, and it passed no title at all; that it did not pay the debt but was a mere attempt to create a lien, which attempt was afterwards ended by its rescission; that its effect was not to satisfy the debt, nor cancel the mortgage, nor pay off the account, and the rescission of it left the parties exactly where they were before; that that being the effect of the paper in law, Mrs. Phillips, if she were a partner, was not affected by it one way or the other, and her liability to

the complainant, if she were not a partner, would not be affected at all by it; that the paper was simply an attempt to create a lien that resulted in nothing, and it and the rescission of it put the parties back, put the custody of the property back, where it was found, without having changed it at all.

The sixth and 7th grounds assigned error upon the refusal of the court to charge thus: "If you believe from the evidence that plaintiff bought of Neal certain stock of merchandise and certain choses in action or notes, and did so without the knowledge of Mrs. Phillips or her agent, and left the property and effects in the hands of Neal to be sold for the benefit of plaintiff, the law would place the burden upon the plaintiff of properly applying the proceeds to the payment of the debt due for the purchase of such property, and the debt would be discharged to the extent of the value of any such property, notes, etc., and if of value equal to the debt, then the whole debt would be discharged; and if you should so believe from the testimony, then you would be authorized to find for the defendant, Mrs. Phillips. If you believe from the evidence that Mrs. Phillips and C. A. Neal entered into a partnership and were due the plaintiff a debt for goods, and Neal sold the stock of goods, choses in action, etc. to plaintiff without Mrs. Phillips' consent, then you would be authorized to credit the debt with the value of any purchase, and if you find the value of any such purchase to be equal in value to the amount of the debt, you would be authorized to find for the defendant Phillips."

The other grounds are stated in the opinion.

L. D. MOORE, for plaintiff in error.

LANIER & ANDERSON, *contra*.

SIMMONS, Justice.

1. One of the main issues in this case was whether

Mrs. Phillips was a partner of Neal. The plaintiff in its declaration alleged that she was; she denied it. It is complained of as error in the eighth ground of the motion for a new trial that, pending the trial, Kendall, the agent of the plaintiff, was allowed to testify, over objection of the defendant, "that Neal stated to him in Atlanta that Mrs. Phillips was going in with him and would furnish security to the amount of a thousand dollars." We think the judge erred in admitting this testimony. It was a statement by Neal, not in the presence of Mrs. Phillips. The question in issue being whether Mrs. Phillips was a partner or not, she could not be bound by anything which Neal said. The rest of the evidence on the question of partnership not being conclusive, this testimony doubtless had considerable weight with the jury in finding that she was a partner. She was therefore prejudiced in her rights, and we think ought to have a new trial on this ground.

2. The fourth ground of the motion complains of the construction placed upon the writing given by Neal to the plaintiff. Counsel for the plaintiff in error contends that it was a bill of sale and a delivery of the goods thereunder in payment of the debt. We do not agree with him in this construction. In our opinion, under the facts, it was a written title to the property given by Neal to the plaintiff to secure the company for the purchase price of the furniture which had been sold to Neal, and a written assignment of the notes and accounts. *Biggers v. Bird*, 55 Ga. 650. It being a written title for this purpose, Neal had a right to give it, even if there was a partnership, bearing his individual name. One partner has the right to give a mortgage or other security upon personal partnership property to secure a partnership debt; and if Neal had the right to give it in the first instance as a partner, he also had the right to agree to its cancellation. Therefore, if Mrs. Phillips was a



partner, and the title to the furniture and assignment of the choses in action were given to secure a partnership debt, she was not injured thereby, nor was she injured by the cancellation of the same. If she was not a partner, but a security, and the title was taken by the plaintiff to the goods in the store and choses in action, and afterwards cancelled without her consent, and she was damaged thereby, of course she would be released to the extent she was damaged by such cancellation. The title covered the furniture in the store and the choses in action, and if the creditor surrendered it, and the furniture and choses in action were afterwards lost, the security's liability to that extent would be increased. I will say in passing, however, that Mrs. Phillips in her answer makes no complaint of being injured in this manner, and, of course, could take no advantage of it on the next trial unless her answer be amended. She contends, as we have before remarked, that the writing is a bill of sale, and that its effect was to pay off and discharge the debt due by Neal to the plaintiff. This, we have shown, is not the correct interpretation of the instrument.

3. This being the proper construction to be given to the writing between the plaintiff and Neal, there was no error in refusing to give the requests to charge as complained of in the 6th and 7th grounds of the motion. These requests went upon the idea that it was a contract of sale between Neal and the plaintiff, and that the debt was paid off and discharged thereby.

4. It appears from the record that Neal used in his business a certain "form of a contract" when he sold furniture to people upon the installment plan, reserving title, etc. In the progress of the trial, Mrs. Phillips offered one of these forms in evidence, proposing to prove it was the same form as that used by Neal and filled out by him when he made such sales. This was

excluded, and the ruling of the court is complained of as error in the 9th ground of the motion. There was no error in this ruling. The proper foundation was not laid for the introduction of this paper. One of the originals which had been executed should have been introduced, if obtainable. If none could be obtained from the original parties, or a certified copy of the same from the record, in case they had been recorded, then, perhaps, the paper presented might have been admissible. We can understand how, in case the jury upon the next trial should find that Mrs. Phillips was security, and not a partner, it might be material to show the number and amount of such contracts Neal had at the time the title given to the plaintiff was cancelled.

5. For the same reason the court did not err in excluding from evidence the "memorandum of the names and amounts of Neal's customers as shown by his books the day after the bill of sale was made." The original books should have been tendered or accounted for, before secondary evidence could be offered and admitted.

*Judgment reversed.*

### WOLFE v. BAXTER et al.

Where one died in possession of land under a *bona fide* claim of right thereto, this was *prima facie* evidence of title in him, and his heirs or devisees may recover on proof of such possession, unless a better adverse title is shown by the defendant.

February 23, 1891.

Ejectment. Title. Evidence. Before Judge MILLER:  
Bibb superior court. April term, 1890.

Reported in the decision.

ALEXANDER & TURNBULL, STEED & WIMBERLY and F. A. ARNOLD, for plaintiff.

FELTON & BAXTER, for defendants.

v 86-45

86	705
98	588
98	597
98	702
86	705
101	7
86	705
105	806
86	705
117	78
86	705
118	377
86	705
121	484
86	705
123	377

LUMPKIN, Justice.

In this case the court below granted a nonsuit, and by the bill of exceptions three questions are presented for review. The first, viz. whether or not a plaintiff in ejectment, suing for a one fifth interest in land, and proving a right to recover a one sixth interest therein, can recover the latter interest, needs no argument. It is well settled that a plaintiff may always recover a less amount or interest than that sued for, but never more. In the second place, we deem it unnecessary to discuss whether or not the familiar rule, that in ejectment, where both parties claim under a common grantor, neither need trace title beyond that source, is applicable to the facts of this case, because the case is really controlled by the principle announced in the above head-note, and to that we will now devote our attention.

The plaintiff's evidence made the following case: The land in dispute at some time prior to the year 1853, was in possession of one Byron Scott. Afterwards, in 1853 or 1854, it went into the possession of Robert Freeman, and so remained until his death, which occurred about the year 1855. Robert Freeman died testate, and in his will directed that his entire estate, except what was sold to pay his debts, be kept together and managed for the support and maintenance of his family and the education of his children, during the life or widowhood of his wife, Harriet B.; and if she should marry again, that all his estate be divided equally between his wife and children. It further provided that the wife, if she married, should take her share absolutely, and that the shares of his children should go to them during their natural lives, with remainder, at their deaths, to their children respectively. His wife and one Andrew Comer were appointed executrix and executor of the will, but the former alone

qualified. Mrs. Freeman, in 1863 or 1864, married one Fulton, and died in 1884 or 1885. She remained in possession of the land, as executrix, until her marriage with Fulton, and also after this marriage for a considerable length of time. The testator, Robert Freeman, left five children, two sons and three daughters. One of his sons, James S., married the plaintiff, whose maiden name was Powell. James S. Freeman died about three years after his marriage with the plaintiff, leaving her, as his widow, and one child, James E. Freeman, who lived about a year and died, leaving his mother, the plaintiff, his sole heir at law. The evidence in the case tends to show that no division of the testator's estate, as contemplated by his will, was ever made, and this suit was brought by the plaintiff to recover a fifth interest in the lot of land in dispute, which appears to have been a part of the tract of land occupied by Robert Freeman at the time of his death.

Section 3366 of the code declares that a plaintiff in ejectment may recover upon his prior possession alone against one who subsequently acquires possession by mere entry and without any lawful right. In *Johnson v. Lancaster*, 5 Ga. 39, the same rule is asserted, and also in *Jones v. Scoggins*, 11 Ga. 119. On page 121, Judge NISBET says: "If the plaintiff, as in this case, relies upon possession acquired *bona fide*, and nothing else, and the defendant is in possession as a trespasser, the defendant cannot rely upon that tortious possession, nor can he protect himself by showing a title in a third person." It was held in *Jones v. Easley*, 53 Ga. 454, that a plaintiff in ejectment may recover on prior possession alone against one who subsequently acquires possession without any lawful right, and this is true though the plaintiff may himself show to the jury no title. See also *Scott v. Singer*, 54 Ga. 689. Again, in *Jones v. Nunn*, 12 Ga. 472, Judge NISBET says, "as

against one who can show no better title than naked possession, a plaintiff who has had prior possession may recover upon that possession." See also *Eaton v. Freeman*, 63 Ga. 535. This court ruled in *Hadley v. Bean et al.*, 53 Ga. 688, that possession under a deed will cast the burden on the defendant to show he is not a trespasser, and that he has not acquired possession by mere entry without any lawful right whatever. The above case is cited approvingly in *Parker v. Waycross, etc. R. R.*, 81 Ga. 392.

The rule stated seems, therefore, to have been fully settled both by the statute and repeated adjudications, but this court, in the case of *Bagley et al. v. Kennedy*, has gone further and decided definitely that evidence of such possession will change the *onus* and put the defendant on proof of his title. This whole subject in the case just cited was thoroughly reviewed and discussed by Chief Justice BLECKLEY. The decision was rendered July 12th, 1890, and may be found in 85 Ga. 703, 11 S. E. Rep. 1091. The head-note is as follows: "Possession of land under claim of ownership is *prima facie* evidence of title in the occupant. Hence, where a man died in the year 1829, in possession of the premises now in dispute, persons claiming under his heirs or devisees, and bringing suit in 1887, may recover on proof of his possession, and of title derived from him through his heirs or devisees, as the case may be, unless a better adverse title, by possession or otherwise, appears." In the opinion he quotes the case of *Brown v. Colson*, 41 Ga. 42, where the plaintiff's ancestor died in possession, and the premises were assigned to the widow as dower. She went into possession and died, and these facts were held sufficient, *prima facie*, to put the defendant upon proof of title. He also cites *Buckner v. Chambliss*, 30 Ga. 652, where it was held that an administrator may recover upon the possession alone

of his intestate; and *Boynton v. Brown*, 67 Ga. 396, holding that heirs may recover upon the possession of their ancestor. That opinion also cites a large number of other authorities, to which reference is hereby made.

In the case now before us, Robert Freeman died possessed of the land in controversy, having held and used it as his own. This, we have shown, was *prima facie* evidence of title in him. Under the facts proved in this case his widow could not, either as executrix up to the time of her second marriage, or as tenant in common with his children after her marriage, hold adversely to them, or those claiming under them. It seems that the lands of the testator were never divided in kind. The plaintiff, therefore, as sole heir of one of the testator's devisees in remainder, upon proof of the foregoing facts, showed a *prima facie* right to recover her undivided interest in the land, and the nonsuit against her should not have been granted.

*Judgment reversed.*

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BAIRD *et al.* v. BROOKIN.

Where a deed conveyed land to A., as trustee for B. and her children (B. having, at the time of its execution, no children): *Held*, that the children of B., born subsequently to the execution of this deed, took no interest thereunder.

February 23, 1891.

Estates. Deeds. Before Judge MILLER. Bibb superior court. April term, 1890.

Reported in the decision.

BACON & RUTHERFORD and W. M. WIMBERLY, for plaintiffs.

DESSAU & BARTLETT and R. W. PATTERSON, for defendant.

LUMPKIN, Justice.

Maria E. Shivers, by a deed dated December 18th,

86 709  
93 385

86 709  
106 730

86 709  
107 106

107 107  
107 589

86 709  
113 211

86 709  
115 902

115 817

86 709  
122 637

122 709  
122 709

86 709  
124 1069

124 1071

1862, in consideration of \$2,000, conveyed certain land to Charles H. Baird, trustee for Josephine Baird and her children, "To have and to hold . . . to the only proper use, benefit and behoof of him, the said Charles H. Baird, in special trust for the sole and separate use of Josephine Baird and her children, his heirs, executors, etc., in fee simple." At the time this deed was executed, no children had ever been born to Mrs. Baird, but since then she has become the mother of several children. This case was submitted to the judge below upon a construction of this instrument, the question being, whether or not these children of Mrs. Baird, born after the execution of the deed, took any interest thereunder in the property. The court below held that they did not, and in accordance with this opinion, directed a verdict for the defendant. It is conceded that if the court's construction of the deed was right, the verdict was proper; otherwise, it was not.

We are of the opinion that the ruling of the court was correct. This court has already decided, in the case of *Lofton v. Murchison et al.*, 80 Ga. 391, that "A will, made and probated in the year 1847, by which the testator devised to his daughter certain land, 'to her and her children, free from the disposition of any future husband,' (the daughter then having no children) conveyed to her an absolute fee; and children born to her after the testator's death took no estate under the will by way of remainder or otherwise." The case of *Wiley, Parish & Co. v. Smith et al.*, 3 Ga. 551, was one where a testator devised property to his executors *in trust* for his son, William Brantley, and his children (William at the time having no children), with devise over to the heirs named in his will upon William dying without having a child or children; and it was held that William took an estate-tail, with remainder to the heirs named in the will, and this, of course, under our statute, made

a fee simple in William, the first taker. A devise to "A's children, their heirs and assigns forever," vests the title to those *in esse* at the death of the testator.

*Wood et al. v. McGuire*, 15 Ga. 203. Upon a deed conveying land to Mills, trustee for Mrs. Mills and her children, in fee simple, held that Mrs. Mills and her children *then in life* took the land as tenants in common, and that it did not go to her during her life, with remainder to her children. *Loyless v. Blackshear et al.*, 43 Ga. 327. Where a deed was made by A., conveying property to the heirs of B. (the latter then having three children *in esse*), the title passed to those three children, and after-born children of B. took no interest. *Tharp et al. v. Yarbrough et al.*, 79 Ga. 382.

The case of *Estill v. Beers et al.*, 82 Ga. 612, was one in which a deed from Gazaway B. Lamar conveyed property to G. de Rosset Lamar, in trust for himself and his three sisters (naming them), the portions of the sisters to be settled upon them, so as not to be responsible for the debts of any husband they might have, "but for the sole use, benefit and advantage of each of these sisters *and their child or children*." At the date of this deed, one of the sisters had one child, and the others had none. In that case, the precise point ruled was that the child in existence when the deed was made took an interest, as tenant in common, with his mother, but Chief Justice BLECKLEY also remarked that "the daughters who had no child or children, took an estate severally to themselves in fee simple." While this remark was *obiter*, it shows the bent of the court's mind at the time, and is now adopted as sound law. The head-note in that case is manifestly incorrect, as even a casual reading of the case will show. In addition to what it contains, it should also be made to recite that the conveyance was to G. de Rosset Lamar in trust for himself and his three sisters, and as to the



latter, for the sole use, etc., "*of them and their child or children.*"

In Wild's case, 6 Coke's Rep. 16 b., the second head-note is as follows: "A devise to B. and to his children, or issues, B. having no issue at the time of the devise, is an estate-tail; otherwise when he has issue at the time"; and these comments are made thereon: "And, therefore, this difference was resolved for good law, that if A. devise his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate-tail; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, *scil.* as much as children or issues of his body; for every child or issue ought to be of the body, and therewith agrees a case, Trin. 4 Eliz., reported by Serjeant Bendloes, where the case was, that one devised land to husband and wife, 'and to the men-children of their bodies begotten,' and it did not appear in the case that they had any issue male at the time of the devise; and therefore it was adjudged that they had an estate-tail, to them and the heirs males of their bodies; but if a man devises land to A. and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary."

Following Wild's case, and citing it as authority, is the case of Byng v. Byng, 10 H. of L. Cases, 170, where it was held that "When there is a devise of land to A. B. and his children, and at the time of the devise he has no child, the word 'children' is *prima facie* a word of limitation, and the first taker shall have an

estate-tail." In this case, concurring opinions were delivered by Lord Chancellor Westbury and Lords Cranworth and Kingsdown, all upholding the rule in Wild's case, and reaffirming the doctrine therein stated, as expressed above. See, also, *Sweetapple v. Bindon*, 2 Vernon's Ch. Reps. 536.

The learned counsel who so ably argued this case for the plaintiffs in error undertook to take it out of the rule in Wild's case, on three grounds: (1) because the instrument now under consideration is a deed, and not a will, and for this reason a different rule of construction should be applied; (2) because in the deed from Mrs. Shivers, a trustee is appointed, and the conveyance made to him instead of Mrs. Baird and her children directly, whereby the estate might be preserved till children should be born; and (3) because, as he argued, it was a reasonable inference, from the terms of the deed itself, that the maker intended to include in its benefits the after-born children of Mrs. Baird. Taking these propositions in their order, we will first discuss whether or not it makes any difference that the paper in question is a deed instead of a will. Under our system, we do not think this fact should vary the rule of construction. In the several chapters of our code relating to the creation of estates, it seems immaterial whether those estates are made by will or by deed. I refer especially to section 2250, which treats of gifts or grants such as would, under the common law, create estates-tail, without making any distinction as to whether such estates are created by deed or will. It is true that the deed before us was made a short time before the code went into effect, but our understanding is, that many of the various sections of the code in the chapters above referred to simply embody the spirit of our law as it was understood and enforced before the adoption of the code. In support of this, I

quote from the opinion of Chief Justice LUMPKIN in *Shumate v. Williams*, 34 Ga. 249: "The presumption is a fair one, that the code correctly renders the substance of all statutes then [that is, at the time of its adoption] in force, except where modification plainly appears. It would be making a too limited use of this great book to consult it only for the present state of the law, overlooking the fact that while it introduces numerous changes, it is mainly a declaratory exposition, in a concise and systematic form, of the body of laws, common and statute, which the codifiers found already established. One of its prime objects was to clear up obscurities and resolve doubts. It speaks to us of the past, as well as of the present and future; not, it is true in the same imperative voice, but with that mitigated authority which belongs to legislative interpretation, led and directed, in this instance, by the professional ability, both of the codifiers themselves and of the committee of lawyers who, after scrutinizing their work, approved and recommended its adoption."

Another view of this question may be submitted. Children and grandchildren being the natural objects of a testator's affections, it is to be supposed that in the making of his will he usually bears them in mind, and desires them to share in and enjoy his bounty. This is manifest from the large number of wills providing, in one way or another, for the testator's descendants. Deeds are contracts, in the making of which both contracting parties are supposed to take care of themselves; and where a grantee intends to contract for the benefit of his children, as well as of himself, having the same natural desire in their behalf as in case of a testator making a will, and being a party to the instrument, he has the opportunity to secure the end desired by having the deed speak its real purpose plainly and unmistakably. It would seem, then, that

no rule more favorable to the interests of children ought to be allowed in the one case than in the other. We have seen what construction has been uniformly put upon wills containing language like that in the deed before us; and on general principles, we can see no good reason why such deeds should not be similarly treated. Indeed, it will be observed that in several of the cases above cited, the instruments construed were deeds, and yet no distinction was made in any of them because the paper under consideration was a deed, and not a will.

In the second place, we do not see that the interposition of a trustee should change the rule. In the cases above cited from the 3d *Ga.*, the 43d *Ga.*, and the 82d *Ga.*, the titles were put in trustees. The instruments construed in all these cases, were made prior to the passage of the act of 1866, known as the "woman's law," by which the property of married women was vested in them as their separate estates. In the case cited from the 43d, it is fair to presume, and in that cited from the 82d, it plainly appears, that the conveyance of the property to a trustee was for the purpose of protecting it from the marital rights of the husband. The deed now under consideration was made in 1862, and it is quite as reasonable to conclude that the conveyance was made to a trustee in order to protect the property from the marital rights of Mrs. Baird's husband, as that this was done to preserve the estate for the benefit of children yet to be born; and this being true, the presence of the trustee in the deed may as well be accounted for upon the one theory as the other. As Chief Justice BLECKLEY remarked, discussing another question, in the case above cited from the 80th *Ga.*, "When a third thing is equally compatible with either of two others, it affords no reason for inferring one of the two rather than the other." Hence, we con-

clude that a deed of this kind should be treated and construed exactly as if no trustee had been interposed, and the decisions of this court to which we have above referred, seem to justify this conclusion.

In the last place, in reference to the well-settled doctrine that all rules of construction should yield to the manifest intention of the maker, this should only be done when such intention may be plainly and easily gathered from the instrument itself. An examination of the cases in which the courts have sought to follow the intention of the maker of an instrument, without resorting to rules of construction, will show that in almost every instance there were superadded words which plainly indicated what the intention was. In the case of *Toole, adm'r, v. Perry*, 80 Ga. 681, cited by counsel for the plaintiff in error, it was held that a devise to the testator's daughters and their children would not only include children in life at the death of the testator, but also others born after his death, by the daughter's first husband, and others still by a second husband whom she married after the testator's death. But Justice BLANDFORD, in delivering the opinion, said distinctly that this conclusion was reached by the court because, from the language used in the will itself, it must have been the intention of the testator to include all the children of his daughters, no matter when they might be born; and this statement is based upon the fact that, in this particular will, the testator referred to the present or any future husbands of his daughters, and declared that the husbands of those under coverture when the will took effect should be the trustees, respectively, of the portions given to their wives and children. In the cases of *Brady et al. v. Walters*, 55 Ga. 25, and *Boyd et al. v. England*, 56 Ga. 598, the deeds contained the words, "children born and to be born," and, of course, in these cases, the intention was clear, because it was *plainly expressed*.

So in *The Chess Carley Co. v. Purtell*, 74 Ga. 467, this court held that the words, "her present heirs," manifestly meant the children of Mrs. Purtell then living, and ruled the case on the idea that the intention was plain.

In the deed from Mrs. Shivers there were no super-added words, or other expressions, to take the case out of the rule in Wild's case. It is simply a plain deed, in the usual form of such deeds, and no more, with nothing in the context outside of the conveying clauses to aid in arriving at the intention of the paper. We think it has been clearly shown that if this paper was a will, there would be no question at all as to the propriety of applying the rule stated; and, as we have undertaken to show that the same rule should be applied to both wills and deeds, it follows that the children of Mrs. Baird, born subsequently to the execution of this deed, could take nothing thereunder, but the fee was absolutely vested in the first taker. The judgment of the court below is therefore

*Affirmed.*

#### SANDERS v. THE STATE.

1. An indictment for larceny after trust, charging the defendant simply by name, but not alleging he was a bailee of any kind, with fraudulently converting to his own use, or otherwise disposing of 15 head of beef cattle worth \$20.00 per head, which had been entrusted to him, but not stating for what purpose, cannot, on special demurrer thereto, be upheld under section 4422 of the code, because it fails to state in what character or capacity the defendant was so entrusted; nor under section 4424, because it does not allege the object of the bailment.
2. An indictment under either of the above sections charging the disposition of the property in the alternative, is not good, when this objection is raised by special demurrer.
3. In such an indictment, the description of the property as set forth in the first head-note is sufficient.
4. When evidence was admitted without objection, and there was no motion to rule it out, this court cannot consider whether such evidence was legal and relevant or not, the point not being properly made.

February 23 1891.

86	717
88	32
86	717
89	121
86	717
91	656
86	717
100	108
101	213
86	717
103	15
105	620
86	717
d112	395
86	717
113	1148
86	717
114	78
86	717
e120	491
86	717
e121	415
86	717
124	217
86	717
f125	786

Criminal law. Larceny after trust. Indictment. Bailment. Practice. Before Judge MILLER. Bibb superior court. April term, 1890.

Reported in the decision.

M. G. BAYNE and R. W. PATTERSON, for plaintiff in error.

W. H. FELTON, JR., solicitor-general, and HARDEMAN & NOTTINGHAM, *contra*.

LUMPKIN, Justice.

1. The indictment charged Sanders with larceny after trust, alleging that he did, "having been entrusted by G. W. Bird with 15 head of beef cattle worth \$20.00 per head, fraudulently convert the same to his own use, or otherwise dispose of the same without the consent of said Bird, and to the injury of said Bird in said amount, and without paying to said Bird on demand the full value or market price thereof, which demand was made." The defendant demurred specially to the indictment on several grounds, including the following : (1) that the indictment did not set out the purpose for which the cattle were delegated in trust ; (2) that it did not specifically describe the property ; (3) that it did not show how the property was disposed of, but charged the same to have been "otherwise disposed of."

To sustain this indictment it must conform to the requirements of either section 4422 or 4424 of the code. The former of these sections relates to factors, commission merchants, warehouse-keepers, wharfingers, wagoners, stage-drivers, common carriers, or *any other bailees*. We take it that this section means the same as if it had read any other *like* bailees ; that is, it was intended to apply to all bailees, who from the very nature of their business invite the confidence of the public, and the entrusting to them of personal property to be dealt with in the course of such business. In each in-

stance, the particular character of the business would, of itself, indicate the purpose for which the bailment was made, and hence this section does not specifically require the purpose of the bailment to be stated. It is true the section does use the words "or any other bailee," but these words follow immediately an enumeration of several particular kinds of bailees and should be construed to mean other bailees of like character, bailees *ejusdem generis*. In Sutherland on Statutory Construction, §268, it is said: "When there are general words following particular and specific words, the former must be confined to things of the same kind," and a case is cited where an act imposing a penalty for hauling any timber, stone, or other thing, except on wheeled carriages, was held not to extend to straw, but confined to weighty things likely to cause injury to roads. *Radnorshire Co. Road Board v. Evans*, 3 B. & S. 400. In the next section another case is referred to wherein an act authorizing landlords to distrain for rent "all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estates demised" was held not to include trees, shrubs and plants growing in a nursery garden. *Clark v. Gaskarth*, 8 Taunt. 431. Again, in §270, the author says: "When a specific enumeration concludes with a general term, it is held to be limited to things of the same kind." "It is restricted to the same genus as the things enumerated"; and cites *Countess of Rothes v. Kircaldy W. W. Commissioners*, L. R. 7 App. Cases, 706, and *Fenwick v. Schmalz*, L. R. 3 C. P. 315. In the same section we find these words: "It was enacted that 'no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any labor, business or work of their ordinary callings upon the Lord's day.' This was held not to include a farmer, or drivers of stage coaches, or attorneys"; and numerous cases are cited.



These illustrations might be multiplied indefinitely, but it is hardly necessary. The principle contended for is stated in slightly different words, in Endlich on Interpretation of Statutes, §405, as follows: "But the general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same genus as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended." It would, therefore, seem clear that the words "or any other bailee" in section 4422, must be so restricted as to include only bailees of like kind as those specifically enumerated, such as might be termed "professional" bailees, or bailees engaged in some sort of business which requires the custody, handling or transportation of the property of others. Now, as the defendant below in this case was neither designated as a bailee of any such kind, nor so described as that it could be reasonably inferred from the words used he was intended to be so designated, this indictment cannot be supported under that section.

It will now be inquired if the indictment is good under §4424. That section is certainly broad enough to include all persons, if the charge is properly set forth, because it enacts that "if *any* person, who has been entrusted," etc., but it also unmistakably requires that the purpose of the trust shall be declared, because as to each of the numerous classes or kinds of property mentioned in the section it specifies a particular object for which the same shall be entrusted, and makes the violation of that particular trust a crime. This question has been definitely settled by this court in the case of *Carter v. The State*, 58 Ga. 326. Referring to this very section, Judge TRIPPE, on page 328, says: "It is

as much necessary that the character of the bailment, the purpose for which the thing is entrusted, shall be set forth in the indictment, as it is proper to describe the thing or article itself." The decision of our own court, above cited, is borne out fully by a very recent Kansas case, that of *State v. Griffith*, reported in 25 Pacific Reporter, p. 616. That was an information for embezzlement, the gist of which offence is, of course, very similar to that of our statutory offence of larceny after trust. The head-note is as follows: "An information under section 90 of the crimes act against a bailee must set forth the character of the bailment, and the purpose for which the defendant was entrusted with the property. A charge that the defendant embezzled certain property of another which had been, prior thereto, delivered to defendant as bailee, without alleging from whom the property was received or the purpose for which it was delivered to him, will be held fatally defective on a motion to quash." Johnston, J., delivering the opinion, says, in substance, that nothing was stated in the information indicating the special purpose for which the property was placed in the defendant's hands, or the conditions upon which he was expected to hold, dispose of, or return it, and that the "information should contain the essential facts to be proved, and whatever is necessary to put the defendant on notice of that with which he is charged, and of which he is to be convicted." As the indictment against Sanders does not set forth the character of the bailment to him, or allege any purpose for which the cattle were delivered to him, and this point was distinctly made by the demurrer, the indictment was not sufficient to bring the case under this section, and having shown it was not good under the other section, it follows that it should have been quashed.

2. The indictment charged that the defendant did

fraudulently convert the property to his own use, "or otherwise dispose of the same." We think this was bad pleading. If the charge intended to be made against the defendant was that he fraudulently converted the property to his own use, the indictment might have stopped, as to that allegation, without adding the words above quoted, and would, doubtless, have been sufficient for that purpose. If it was intended to charge him with making some other felonious and unlawful disposition of the property, what that disposition was should have been stated, and even if this had been done, the two things ought not to have been connected by the disjunctive "or," because this leaves the defendant uncertain of what particular form of larceny after trust he is accused. It is no reply to this to say the indictment follows the words of the statute. The statute in this section, so far as relates to the disposition of the property, makes at least two kinds of larceny after trust, one by fraudulently converting the thing entrusted to defendant's own use, and another by making some other disposition of it different from that for which it was delivered to him. The defendant when he demands it, as by demurrer, is entitled to know for what he must answer. The pleader may, if he chooses, charge him with committing the offence in more than one way, by using the copulative conjunction, and setting out the facts with sufficient fullness, but he may not allege that defendant committed the crime in one of two ways. That would not affirmatively charge he committed it in either way. The case of *Johnson v. The State*, 8 Ga. 453, does not conflict with this view, because in that case neither the motion to acquit nor to quash the indictment was made on the ground that the charge was in the alternative, but rather because "no specific sum of money, or specific article (was) alleged or proven to have been won or lost." Hence the

precise point now being considered was not raised at all in that case, nor was there any special demurrer to the indictment as in the case at bar. The following is the doctrine laid down in Wharton's Criminal Pleading and Practice, §161: "The certainty required in an indictment precludes the adoption of an alternative statement. Thus if the indictment charge the defendant with one or other of two offences, in the disjunctive, as that he murdered or caused to be murdered, . . . sold **spirituons** or intoxicating liquors, etc., it is bad for uncertainty." See also §162, which reads as follows: "Where a statute disjunctively enumerates offences, or the intent necessary to constitute such offences, the indictment cannot charge them disjunctively. Thus where a statute against unlawful shooting affixes a penalty when the act is done with intent to maim, disfigure, disable, or kill (in the disjunctive), the disjunctive statement of intent is bad. Under statutes also, describing the several phases of forgery disjunctively, it is held fatal to say that the defendant forged, or caused to be forged, an instrument, or that he carried and conveyed, or caused to be carried and conveyed, two persons having the small-pox, so as to burden a certain parish. It is therefore error to state the successive gradations of statutory offences disjunctively; and to state them conjunctively, when they are not repugnant, is allowable." Numerous authorities are cited under this section.

3. The description of the property as set forth in the first head-note was sufficient in a case of this kind. If the indictment had been for simple larceny, it would not have been so, because it would not have met the requirements of section 4398 of the code, but as our statutes against larceny after trust do not prescribe what kind of description shall be made of the property, we may resort to general principles and other author-

ities in determining what will suffice. In 2 Bishop on Criminal Procedure, §700, numerous illustrations are given of descriptions of stolen property in indictments which were held sufficient. These descriptions are not, in many instances, fuller than that in this case against Sanders. It was held in *Short v. The State*, 36 Tex. 644, that "one beef steer of the value of fourteen dollars, the property of," etc., was good. In §702 of Mr. Bishop's work just referred to, he gives the rule for determining the sufficiency of a description of the stolen things in larceny. The language this distinguished author uses is so apt, I quote the entire section: "The object to be gained by the description of the stolen things—namely, to individualize the transaction, will indicate how definite it should be. The court should be able to see from it that the things are, in law, the subjects of larceny; else the indictment will not, as it ought, disclose a *prima facie* case. It has been said, likewise, that the jury should be able to see, from the description, that the articles proved at the trial are the same which the indictment mentions. But this rule would be too strict for practical use, and the cases show that it is not observed; though, of course, *variance* in the description would be ill. The rules are, therefore, that the description should be such as, in connection with the indictment, will affirmatively declare the defendant to be guilty, will reasonably inform him of the *particular instance meant*, and put him in a position to make the needful preparations to meet the charge at the trial." If the charge was simple larceny of the cattle, it would be necessary to describe the animals more particularly than in the indictment now before us, because our statute so provides, doubtless in order that the defendant might be fairly put on notice of what cattle he was accused of stealing; but when the charge is that he was entrusted by the prosecutor

with a certain number of beef cattle, and fraudulently converted them to his own use, he is put on notice of *a particular transaction* between himself and the prosecutor, and will easily apprehend it is this transaction to which the indictment refers. In other words, the description in the indictment, in connection with the other allegations thereof, will make it affirmatively appear to the defendant what particular instance is meant, and thus enable him to make the necessary preparations to meet the charge at the trial.

4. The motion for a new trial complains that certain evidence was admitted, but does not state that any objection was made thereto, or any motion to rule it out. It does not appear, therefore, that the court made any ruling at all on this question, and this court, so far as this point is concerned, has nothing before it upon which to rule. On this point nothing further need be added than what is said in the fourth head-note.

*Judgment reversed.*

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JOHNSTON v. PATTERSON.

1. Where the entry of a levy upon a distress warrant included among other things "one crop cotton growing," allowing such levy to be read to the jury on the trial of an issue made by a counter-affidavit to the distress warrant, was no ground for a new trial.
2. A written contract, silent or ambiguous as to certain matters, may, as to them, be explained by parol evidence, not conflicting with anything plainly expressed in such contract.
3. A plea of set-off alleging against the plaintiff in a distress warrant items of indebtedness entirely independent of and disconnected with the rent contract, is not allowable.
4. The defendant in a distress warrant, after arresting the proceeding of a levy thereof as the statute prescribes, may on the trial of the issue thus formed prove by way of recoupment against the plaintiff's demand damages resulting from a breach by the plaintiff of his own stipulations in the rent contract, and in order to do this, it is not necessary to amend his counter-affidavit to set out the grounds of such recoupment.

February 23, 1891.

86	725
91	537
86	725
101	148

86	725
111	537
86	725
112	211
86	725
125	324

86	725
1128	90
128	790

Distress warrant. Levy. Practice. Contracts. Evidence. Pleadings. Set-off. Recoupment. Before Judge MILLER. Bibb superior court. April term, 1890.

Reported in the decision.

STEED & WIMBERLY, C. & H. ESTES, M. G. BAYNE and J. A. THOMAS, for plaintiff in error.

R. W. PATTERSON and R. HODGES, *contra*.

LUMPKIN, Justice.

It appears from the record that Patterson and Johnston made a written contract, dated August 3d, 1888, containing numerous mutual promises and stipulations, and among them the following: that Patterson rented to Johnston 160 acres of land, consisting of 30 acres in the "Grace field," 120 acres in the "big field" and ten acres surrounding the house. Johnston agreed to pay Patterson \$480 rent for the above described premises, on the 15th of October. Patterson also rented to Johnston four mules to be used on said plantation, for which Johnston agreed to pay as rent the sum of \$80. Johnston was also to receive five per cent. on the collections which he might make of rents arising from lands of Patterson which Johnston rented out for Patterson; and Patterson also agreed to pay Johnston \$60 on the 15th of October, provided Johnston should well and truly attend to any business which Patterson might direct on said plantation. It appears also that Johnston had been in possession of the rented premises prior to the date of the above contract, and that the contract between the parties was reduced to writing and executed the day the contract bears date.

There are twenty-seven grounds in the motion for new trial, but they may be condensed into those set out in the head-notes.

1. As appears by the entry of the officer, the distress warrant was levied on certain cotton-seed, corn, peas,

potatoes and "one crop cotton growing." The fact that the entry contained the words quoted was certainly no reason for rejecting the entire levy. Indeed, if the growing crop of cotton had been all the property levied on, we do not see, on the trial of an issue formed by a counter-affidavit to a distress warrant, how allowing this entry to be read to the jury could be of any consequence. It simply went in along with the pleadings in the case, and, though immaterial and perhaps irrelevant, on this sort of a trial, was harmless. Section 3642 of the code might afford good ground to dismiss a levy made on a growing crop, but the reading or not reading of such a levy to the jury in this case, could in no way injuriously affect the defendant's rights upon the issues pending.

2. It was seriously disputed in this case whether the land cultivated by Phillips, and for the rent of which he paid Patterson, was a part of the land for which Johnston was to pay \$480 rent, and whether or not the amount paid by Phillips to Patterson should be a credit on the rent Johnston owed Patterson. The court by its rulings and charges refused to allow Johnston to go into these questions with his evidence, on the idea that he was estopped from so doing by the written contract, and would not be permitted to vary its terms by parol evidence. We think this was error. The contract was silent as to whether or not the land worked by Phillips was a part of that Johnston rented from Patterson for himself, and as Johnston was, by the contract, made the agent of Patterson to rent out his lands, it is uncertain, from the contract itself, whether, if he rented to Phillips a part of the land he had himself contracted to pay rent for, this would reduce *pro tanto* the amount of rent due by him. Where a writing is such that something more than what is expressed therein is to be implied therefrom, parol evidence of anything not inconsistent



with that unexpressed something, is admissible. *McMahan v. Tyson*, 23 Ga. 43. It is too well-settled to require further argument or authority that omissions, ambiguities and uncertainties in written contracts may be explained by parol evidence which does not conflict with anything the instrument plainly expresses, and parol evidence is admissible to apply all written contracts to their subject-matters.

3. The defendant undertook to set off against the plaintiff's claim for rent certain demands which were entirely independent of the rent contract. This he could not do, and the court rightly rejected all the evidence offered for this purpose. It was held in the case of *McMahan v. Tyson* above cited, that while failure of consideration might be set up as a defence to a note given for rent, and sought to be collected by distress warrant, a plea of set-off would not be allowed because it admits the sum it is pleaded against is due. This ruling to the extent above stated is approved in *Rountree v. Rutherford*, 65 Ga. 446.

4. The defendant also sought to recoup against plaintiff's demand for rent damages resulting to him from various alleged breaches by the plaintiff of stipulations and promises by the latter contained in the rent contract itself and immediately connected therewith, such as the plaintiff's agreements to furnish him mules; to pay commissions on rents received from land Johnston might rent out for him; to pay Johnston for his services on the plantation, etc. These defences he ought to have been permitted to make, and for the purpose of so doing it was not necessary to amend his counter-affidavit. *Guthman v. Castleberry*, 48 Ga. 172, and 49 Ga. 272. When the defendant met the levy of the distress warrant by filing the affidavit required by law, and the issue thus formed was returned to court, it was his right to prove his defence. *Holland v. Brown*,

15 Ga. 113; *Drake v. Dawson*, 66 Ga. 174. The following cases are referred to as showing when recoupment is a proper defence: *Mell v. Moony*, 30 Ga. 413; *Lufburrow v. Henderson*, *Id.* 482; *Finney v. Cadwalader*, 55 Ga. 75; *Latimer v. Lane*, 45 Ga. 474.

*Judgment reversed.*

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STEWART v. DELOACH & BROTHER, and *vice versa*.

86	229
88	40
86	729
91	100
88	729
113	430

- LUMPKIN, J.—1. Error in admitting in evidence the copy of a written contract, where the original has not been properly accounted for, is cured when the other party produces and puts in evidence the original itself.
2. A charge stating substantially the law that admissions should be scanned with care, and cautioning the jury not to give them more meaning than they are justly entitled to, was not erroneous.
3. Defendants in error having by petition caused parts of the record to be brought up to this court which are unnecessary to an understanding of the errors complained of, it is adjudged that they be charged with the costs of all matter brought up by them on said petition.
4. The judgment of the court below having been affirmed on the main bill of exceptions, the cross-bill is dismissed.

February 23, 1891.

Evidence. Practice. Admissions. Before Judge GUSTIN. Bibb superior court. November adjourned term, 1889.

DeLoach & Brother sued Stewart for the value of certain machinery, and obtained a verdict. The defendant moved for a new trial, one ground of the motion being that the court admitted in evidence a copy of a written contract for the machinery which had been executed in duplicate, to which the defendant objected upon the ground that the original should be produced. The plaintiffs then proposed to show that the original was lost, and introduced testimony to make such showing; after which the court admitted the copy. At the conclusion of the evidence for the plaintiffs, the defend-

ant moved for a nonsuit, and the motion having been overruled, the defendant put in evidence the original duplicate in his possession.

The other ground of error insisted upon is, that the court erred in charging: "An admission of agents made while they are engaged in the business of their principal and made with reference to the matters in which they are engaged, is evidence against their principals; but admissions should be scanned with care. The jury should look to them carefully to see what they mean, and see that they are not being used to imply and to carry with them more meaning than they are justly entitled to." The admission referred to appeared, from the testimony of the defendant, to have been made by a man sent to his mill in answer to complaints he had made to plaintiffs long after the delivery of the machinery. Defendant testified that this man stated that plaintiffs had gone a little too far in their contract, that they could never comply with it, and that there was no turbine wheel ever made which would run with the same amount of water as an overshot wheel. As part of the defence it was insisted that plaintiffs had guaranteed that the machinery would run defendant's mill with as small an amount of water as an overshot wheel he had been using was ever run with, and that this proved to be untrue.

A new trial was denied, and the defendant excepted. The plaintiffs excepted by cross-bill not material to this report.

DESSAU & BARTLETT, for Stewart.

STEED & WIMBERLY, *contra*.

86 730  
87 159

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CITY OF ATLANTA v. FIRST PRESBYTERIAN CHURCH.

A local statute which confers upon the municipal government power and authority to assess one third of the cost of grading, paving,

macadamizing and otherwise improving the roadway or street proper, on real estate abutting on each side of the street improved, subjects alike all real estate owned by individuals or private corporations, without respect to the purpose or use for which the property is held or to which it is devoted. Churches are not exempt, and after paying such assessment, the religious corporation to which a church belongs cannot recover back the money so paid into the city treasury. *Trustees, etc. v. City of Atlanta*, 76 Ga. 181, overruled.

February 27, 1891. Argued at the last term; reargued at this term.

Municipal and religious corporations. Assessments for street-paving. Before Judge MARSHALL J. CLARKE. Fulton superior court. September term, 1889.

Reported in the decision.

J. B. GOODWIN, J. T. PENDLETON and J. A. ANDERSON, for plaintiff in error.

HOKE & BURTON SMITH, *contra*.

BLECKLEY, Chief Justice.

This was an action by the church, a body corporate and politic, against the city, brought in February, 1887, to recover the sum of \$616.87, the amount paid by the plaintiff to the defendant in January, 1885, in satisfaction of a *fi. fa.* which the city had issued against, and caused to be levied upon, the church building and the premises on which the same was situate, said premises fronting and abutting on Marietta street. The *fi. fa.* was issued for the *pro rata* share of these premises of the cost incurred in the year 1883 by the city in paving with Belgian blocks the roadway or street proper on which the premises abutted. The payment was made under protest, and to prevent a sale of the property in pursuance of the levy. The street was paved by virtue of the act of September 3d, 1881, amending the charter of the city, and the provisions of the act were fully complied with. The church building was used only for church purposes and religious worship. At the trial the facts were agreed upon and reduced to writing,

and by consent of parties, the only question raised was stated thus: "Is property occupied by a church and used for church purposes only, and religious worship, liable for street improvement under the said act of 1881?" The court instructed the jury to find for the plaintiff; and after verdict, the defendant moved for a new trial because of error in this instruction, and because the verdict was contrary to law and to evidence. The motion was overruled.

The act in question (Acts of 1880-1, p. 358) was construed by a majority of this court as then constituted, in *Trustees, etc. v. The City of Atlanta*, 76 Ga. 181; and that decision was afterwards held by a full bench to be conclusive upon the parties in that case, the same case having again come up for review. 83 Ga. 448. The principle of *res adjudicata* made the latter ruling a necessary corollary to the former, whether the first in order was correct or incorrect. But as the present case, although it involves the same question touching the right construction of the act of 1881, is a new case and between different parties, or with one of the parties different, the duty of construing the act *de novo* cannot be declined by the present bench, save upon the ground that the former construction is satisfactory, or if not, that it should be acquiesced in because of some mischief or public inconvenience likely to result from adopting and promulgating a different construction after the first has stood undisturbed for a period of nearly five years.

The rule of *stare decisis* is a wholesome one, but should not be used to sanctify and perpetuate error in so short a term as five years, without very weighty reasons in behalf of public policy. At the last term of this court, we recognized the rule, in *Scott v. Stewart*, 84 Ga. 772, as a right rule of decision where many transactions of the public at large, based on an exposition of the law

declared ten or eleven years ago, would probably be disturbed or vitiated by expounding the law differently now. We deprecate and distrust rash innovation as much as the most conservative magistrates ought, but it has never been the doctrine of any court of last resort that the law is to be a refuge and safe asylum for all the errors that creep into it. Indeed, the mind, private or official, which closes down upon all the errors it embraces, refusing to eject them when exposed, is no longer fit for the pursuit of truth. Courts, like individuals, but with more caution and deliberation, must sometimes reconsider what has been already carefully considered, and rectify their own mistakes. If this is to be done in any case, it would seem to be a case like the present, where a change of decision would uproot no transaction founded on the prior decision, and where the effect in the particular controversy at the bar would be simply to leave the parties where they had placed themselves by doing aright what one of them now seeks to have undone. If in very truth, according to the real law of the matter, the church corporation paid to the city a debt which it justly owed and for which it was legally liable, it could not recover back the money consistently with christian morality, were there no other obstacle to withdrawing the cash from the city treasury. Nor does the corporation desire so to do; for it has united with the city in formulating thus the question to be decided: "Is property occupied by a church and used for church purposes only, and religious worship, liable for street improvement under the said act of 1881?" We could not answer truly according to our judicial convictions by citing and following the case in 76 *Ga.*, for we think that case misconstrues the act and unduly restricts its application.

The act, after conferring power to grade, pave, macadamize and otherwise improve the streets, invests

the mayor and general council with "power and authority to assess one third of the cost of grading, paving, macadamizing . . . and otherwise improving the roadway or street proper, on the real estate abutting on each side of the street improved: Provided, that before any street, or portion of a street, shall be so improved, the persons owning real estate which has at least one third of the fronting on the street, or portion of a street, the improvement of which is desired, shall, in writing, request the commissioners of streets and sewers to make such improvements, and said commissioners shall have approved the same, and shall forward the same, with their approval, to the mayor and general council, with a statement of the character of the improvement proposed to be made, and an estimate of the cost of the same, and said mayor and general council shall by ordinance direct the said work to be done." Acts of 1880-1, pp. 359, 360. The act proceeds to confer power to adopt by ordinance a system of equalizing assessments and prorating the cost "on the real estate according to its frontage on the street, or portion of a street, so improved." It declares "that the amount of assessment on each piece of real estate shall be a lien on said real estate from the date of the passage of the ordinance providing for the work and making the assessment"; and it gives the mayor and general council "authority to enforce the collection of the amount of any assessment so made for work . . . upon streets . . . by executions to be issued by the clerk of council against the real estate so assessed, and against the owner thereof at the date of the ordinance making the assessment, which execution may be levied by the marshal of said city on such real estate, and after advertisement and other proceedings, as in cases of sales for city taxes, the same may be sold at public outcry to the highest bidder, and such sale shall vest

an absolute title in the purchaser: Provided, that the defendant shall have a right to file an affidavit" to contest the amount due, etc. *Id.* p. 860.

It only requires that language shall be taken in its ordinary signification, in conformity to the rule of construction laid down in section 4 of the code, for us to be able to hold, not as a conjecture, but with absolute certainty, that the terms, "real estate abutting on each side of the street improved," include all lands so abutting, no matter to whom they belong nor how the buildings upon them may be occupied or used. Church property, therefore, is manifestly within the letter of the act, and as clearly within it as any other property whatsoever. The grant of power to assess it is no less express than is the grant of power to assess any other. The act neither makes nor hints at any discrimination, but uses words which embrace all real estate as appropriately and completely as they embrace any part of the same. It would be as consistent with the letter of the statute to deny that it comprehends any real estate at all, as to deny that it comprehends all that abuts on the street. This is the plain truth; and yet the opinion of the court in 76 *Ga.* pp. 187, 188, launches the argument by referring to the rule that no corporation can exercise any power not expressly conferred or necessarily implied, and after observing that places of religious worship, etc. are not brought directly by name within the provisions of the act, adds, "and we do not think they can be brought within it by construction or necessary implication, unless it is made to appear that the property so exempted from taxation is used for purposes of 'private or corporate profit or income.'" This seems to be the fundamental error of the opinion; it treats the city as invoking implication, whereas, the city points to an express grant, and the church invokes implication to limit the words of the grant. True,



church property is not brought in by its special name ; nor is any other, the name applied to all alike being, "real estate abutting on each side of the street improved." The property now in question, though belonging to a religious corporation and used exclusively for worship and church purposes, is "real estate," and it abuts on Marietta street, the street improved. The true and only problem is, whether it can be taken out of the act by implication, not whether it can be brought in. The legislature, by not excepting any real estate whatever, has put it in, and no consistent and unforced construction of the act can be arrived at without setting out from this standpoint. To deny the natural import of the words of a statute, and thus exclude from them something that they evidently comprehend, and then to argue that this same thing cannot be brought in by implication, is to expel the occupant and then keep him out because he was never in. If the words, "the real estate abutting on each side of the street improved," are not definite and free from all manner of ambiguity, no words can be. And yet, clear and definite as they are, we can be morally certain that they comprehend more than the legislature intended they should ; for they cover by their letter public as well as private property, and subject the whole alike to assessment, lien, levy and sale. That the public property of the United States, the State, the county or the city, was intended to be dealt with thus is so improbable that we can have no hesitation in holding that an implied exception as to all public property can and should be engrafted upon the act by construction. And just here the real question in its ultimate form emerges : can a like exception in favor of church property, which all will agree is not public but strictly private property, be recognized, and the words of the statute still further narrowed by construction so as to exclude it also ? No

answer to this question is afforded by citing the clause of the constitution which authorizes the General Assembly to exempt church property as well as public property from taxation, and citing with it the act of 1878 (Code, §798), by which the power was exercised throughout its whole extent, and thereby, for the time being, exhausted. This court has ruled in *Hayden v. Atlanta*, 70 Ga. 817, a case which arose out of the identical statute we are now construing, that the taxation to which that power relates is taxation for revenue, and not local assessments for the improvement of streets, which latter are in the nature of an interchange of equivalents between the public and the owners of property locally benefited by the improvement. By general and now almost unanimous concurrence throughout the jurisprudence of the American States, there is an essential difference between the two species of taxation, and many rules, whether constitutional or statutory, which govern the former are without application to the latter. See, besides the citations in *Hayden v. Atlanta*, *supra*, *City of Birmingham v. Klein*, 89 Ala. 461, 7 So. Rep. 386; *Speer v. Athens*, 85 Ga. 49, 11 S. E. Rep. 802; 2 Dill. Mun. Cor. (4th ed.) §§777, 778. Consistency requires that when the constitution has been ruled, as in *Hayden v. Atlanta*, not to apply to local assessments, its provisions on the subject of taxation should not be treated as authority, direct or indirect, for holding property of any kind exempt from such assessments. If it supplies no rule for levying assessments, and declares no exemption from their imposition, what control can it possibly have when a statute on the subject of assessments is under construction. To appeal to it in the discussion, is either to recede from the doctrine that it is silent on assessments, or to invoke what it says on one subject to limit what the legislature has expressly said when treating of another.

Surely, the mere grouping of church property with public property, first by the constitution and then by the statute, in dealing with taxation proper, is no sufficient reason for concluding that the legislature intended that they should stand upon the same footing in the law of local assessments, where no such intention has been anywhere declared. The argument that because the legislature, under express authority granted to it by the constitution, has expressly exempted church property from taxation, therefore it has impliedly exempted it from local assessment, is manifestly fallacious. The constitution itself exempts nothing, not even public property; it only gives authority to the General Assembly to make certain exemptions. Without some express promulgation of the legislative will, no private property whatever could claim exemption from general taxation. How can a system of express exemption from such taxation be a legitimate premise from which to conclude that the legislature intends a system of implied exemption as to certain private property to run through its enactments on the subject of local assessments? Having once made the distinction between the two species of taxation, and professing still to adhere to it, we ought to accept its consequences. In no other way can consistency be maintained; and nothing inconsistent is law, for the law is never in conflict with itself, nor one part with another part.

It may be said, however, that the opinion we are reviewing does not cite the constitution, and the statute under it exempting church property from taxation, as authority, direct or indirect, but only as evincing on the part of the State a friendly spirit and disposition toward religious institutions and instrumentalities. For this purpose we concede the citation would be legitimate. The constitution defines very explicitly the

fiscal relation which the State is to bear to Religion. It declares, on the one hand (Code, §5006): "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religionists, or of any sectarian institution." This settles it that the State shall pay nothing to the church. It declares on the other hand (Code, §§5181, 5182, 5184): "All taxation shall be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. . . The General Assembly may, by law, exempt from taxation all public property, places of religious worship or burial; all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy, or other seminary of learning; the real and personal estate of any public library, and that of any other literary association, used by or connected with such library; all books and philosophical apparatus; and all paintings and statuary of any company or association, kept in a public hall, and not held as merchandise, or for purposes of sale or gain: *Provided*, the property so exempted be not used for purposes of private or corporate profit or income. . . All laws exempting property from taxation, other than the property herein enumerated, shall be void." This settles it that the church, like other proprietors, shall pay taxes upon its whole property unless the legislature shall think proper to exempt its places of religious worship, etc., not used for purposes of private or corporate profit or income. All property of the church not embraced in this power of exemption stands, with reference to the State, upon exactly the same footing as if it belonged to individuals and had no connection with religious uses whatever. With respect to it, there can be no exemptions from general taxation expressly

granted, much less any resulting from implication only. And the scheme of the constitution evidently is to have no implied exemptions at all, certainly none other than of public property. It may be that were the legislature to lay a tax for the benefit of the State upon all property, without having declared any exemption whatever, the statute might be construed as impliedly excepting public property; but no court, we apprehend, would feel warranted in extending the implication to church property. Thus the matter stands with reference to the species of taxation with which the constitution deals, to wit, taxation for revenue. The policy of the State, as indicated by the constitution, is to make no discrimination in favor of property devoted to religious purposes save by express statute. Whilst the legislature is empowered to extend favor to such property, it is expected to do so, if at all, by express provision. And such is now our whole statutory scheme with reference to churches and Religion. The policy is to favor them—favor them highly—but to leave no favor whatever to implication. This is shown by the opinion we are reviewing. It correctly refers to a great number of topics in respect to which favors have been granted, but they have all been expressly granted. In the whole range of our State legislation since the adoption of the code, we know of no instance in which the legislature has been understood to intend any favor or privilege in behalf of the church which it has failed to set down and specify in express terms. Taking the code and all our statutes together, we have a comprehensive and specific enumeration of particulars, in respect to which religion and those engaged in its ministrations are preferred or favored; but surely this is no warrant for a court to add to these favors by construction or implication. On the contrary, as the legislature has expressed so much, the in-

ference ought to be that its expressions are coextensive with its will and intention.

Glancing now at the current of authority, let us see how the stream runs. In *People v. McCreery*, 34 Cal. 456, the Supreme Court of that State say: "The meaning of taxation must be kept in view, and that is, a charge levied by the sovereign power upon the property of its subject. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the State, whether lands, revenue or other property, and the property of the United States." Accordingly, it was held in *Doyle v. Austin*, 47 Cal. 353, that a statute providing for the opening of a street, and for the payment of the expenses by assessment upon the lands benefited, was not vitiated by an express exception from liability in making the assessment of lands belonging to the United States, the State of California, and the city, respectively, although it appeared by the report of the assessors that these lands would be benefited to the extent of \$800,000.00. That property belonging to the public, and held for public uses, is exempt from taxation when not expressly subjected thereto, is held in the following cases: *City of Rochester v. Town of Rush*, 80 N. Y. 302; *Directors of Poor v. School Directors*, 42 Pa. St. 21; *City of Louisville v. Commonwealth*, 1 Duvall, 295. The same rule prevails as to assessments for local improvements of a public nature. Inhabitants of *Worcester v. Mayor, etc. of Worcester*, 116 Mass. 193; *County Commissioners v. Board, etc. of Maryland Hospital*, 62 Md. 127, 7 Am. & Eng. Cor. C. 300; *State of Connecticut v. City of Hartford*, 3 Am. & Eng. Cor. C. 610, the editor citing 49 Conn. 89, which is a miscitation. In Missouri, it would seem, an exemption is not implied in favor of all public property. *St. Louis Public Schools v. St. Louis*, 26 Mo. 468. And in Illi-

nois, under the constitution of 1870, such exemptions are not implied. *Adams County v. Quincy*, 22 N. E. Rep. 624, 27 Am. & Eng. Cor. C. 150. In New York, certain words contained in a city charter were construed to subject property of the State to assessment for the improvement of a street. *Hassin v. City of Rochester*, 67 N. Y. 528. In Texas (*Harris County v. Boyd*, 7 S. W. Rep. 713) an exemption in the constitution protecting the property of counties, cities and towns held only for public purposes, from forced sale and from taxation, was ruled to extend to an assessment against a court-house for the improvement of a street. It is manifest, however, that this decision could have been rested upon the general principle announced by the courts of Massachusetts, Maryland and Connecticut, to the effect that public property is not included in statutes for local assessments unless specially named.

Implied exceptions in favor of public property also prevail over general words in a statute founded on the exercise of the power of eminent domain. *Mayor, etc. of Atlanta v. Central R. R.*, 53 Ga. 120; *St. Louis, etc. R. R. Co. v. Trustees*, 43 Ill. 303. We thus see that to engraft an exception upon the amended charter of Atlanta in favor of public property has the sanction of authority. But no such rule prevails, so far as we know or have been able to ascertain, in favor of private property used for religious purposes. In the following cases churches, although not expressly named in assessment statutes, were held to be subject to assessment for local improvements, notwithstanding they were exempt by express law from general taxation: *Matter of the Mayor, etc. of New York*, 11 Johns. 77; (and see *Harlem Presbyterian Church v. Mayor*, 5 Hun, 442; *Matter of Second Ave. M. E. Church*, 66 N. Y. 395; *People v. Mayor, etc. of Syracuse*, 2 Hun, 433); *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Le-*

*fevre v. Mayor, etc. of Detroit*, 2 Mich. 586; *City of Ottawa v. Trustees of Free Church*, 20 Ill. 423; *Broadway Baptist Church v. McAfee*, 8 Bush, 508, 8 Am. Rep. 480; *Lockwood v. City of St. Louis*, 24 Mo. 20. And see *First Presbyterian Church v. Ft. Wayne*, 36 Ind. 333, 10 Am. Rep. 35; *Second Universalist Society v. City of Providence*, 6 R. I. 235. The like rule has been applied to cemeteries. *Mayor, etc. of Baltimore v. Green Mount Cemetery*, 8 Md. 517; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Lima v. Lima Cemetery Ass'n*, 42 Ohio St. 128, 5 Am. & Eng. Cor. C. 547. And to hospitals, asylums and other charitable institutions. *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, 11 Am. Rep. 412; *City of Lafayette v. Orphan Asylum*, 4 La. An. 1; *Boston Seaman's Friend Society v. Boston*, 116 Mass. 181, 17 Am. Rep. 153. And see *City of Chicago v. Baptist Theological Union*, 115 Ill. 245, 13 Am. & Eng. Cor. C. 409; *Matter of St. John's Asylum*, 69 N. Y. 353. Also, to institutions of learning, etc. *Matter of College Street*, 8 R. I. 474.

If express words are requisite to exempt private property from general taxation, there is no reason why like words are not equally necessary to exempt it from assessments. *Lima v. Cemetery Ass'n*, *supra*. Instances of such express exemption are furnished by *State, etc. v. Mayor, etc. of Newark*, 36 N. J. L. 478; *State, etc. v. City of St. Paul*, 36 Minn. 529. But in *City of Chicago v. Baptist Theological Union*, 115 Ill. 245, 13 Am. & Eng. Cor. C. 409, it was held that even an express exemption from assessment could not be granted under the constitution of Illinois because violative of the principle of equality. Inasmuch as the constitution of Georgia neither expressly nor by implication lays down any principle whatever touching local assessments, being entirely silent on the subject, there would seem to be no defect of power in the legislature to spare churches



from such assessments at pleasure. We rule, not that the legislature might not have granted the exemption now contended for, had it been so disposed, but that it has not done so. The question of legal discrimination in favor of church property over secular property in the matter of bearing burdens is one of public policy; and it is for the legislature, not the courts, to mould that policy and proclaim it. The services of Religion to the State are of untold value; but it is the glory of Religion in this country that it serves as a volunteer, without money and without price. *Judgment reversed.*

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#### THE GEORGIA RAILROAD & BANKING CO. v. DOUGHERTY.

The plaintiff purchased at night from the agent of the railroad company a ticket for passage over its road to Atlanta, paying for the same. When called upon, she presented this ticket to the conductor, but it appearing to be for passage to Asheville, N. C., he declined to allow her to proceed. She stated to him the circumstances under which she bought the ticket, and the fact that her trunk had been checked to Atlanta on it (which he subsequently ascertained for himself), and that she had no money with which to pay fare; but he ejected her from the train at a station where there were no accommodations, and from which she had to walk about two and a half miles to secure a place to lodge. She was an old and infirm colored woman, in bad health, and going to Atlanta on account of her husband's death. *Held:*

1. A verdict in her favor against the company for \$1,000 damages was neither contrary to law or evidence, nor excessive.
2. The plaintiff, having applied for the proper ticket, was entitled to rely upon the one delivered to her by the agent, as the proper one, without examining it, there being no intervening circumstances requiring her to do so.
3. A charge that "if she asked for the ticket and there was no mistake on her part in calling for it, and the wrong ticket was given her, then it was the fault of the railroad company," was not contrary to law.
4. The evidence was sufficient to authorize the giving in charge of sections 3066, 3067 of the code, on the subject of aggravation and vindictive damages.

5. Requests to charge which assumed that the plaintiff was chargeable with the consequences of the agent's mistake in delivering to her the wrong ticket, because such mistake might have been discovered by looking at it, were properly refused.

SIMMONS, J., dissenting.

December 20, 1890.

Passengers. Railroads. Damages. Negligence. Charge of court. Verdict. Before Judge EVE. City court of Richmond county. August term, 1890.

Reported in the decision.

J. B. CUMMING and BRYAN CUMMING, for plaintiff in error.

M. P. FOSTER, *contra*.

BLANDFORD, Justice.

The defendant in error brought her action against the plaintiff in error, in which she alleged that she bought from the agent of the railroad company a ticket to go from Aiken, South Carolina, to Atlanta, Georgia, over the road of said company; that she purchased this ticket at night, paid her money for the fare, received the ticket from the agent, and when she was between Augusta and Atlanta, being called on by the conductor for a ticket, she presented the ticket she had purchased, when it appeared that the same was to Asheville, North Carolina, instead of to Atlanta; the conductor objected to the ticket, and said she could not ride upon the same; thereupon she stated to the conductor that her trunk had been checked to Atlanta upon that ticket, which fact he denied but upon subsequent investigation found to be true; plaintiff having no money with which to pay her fare, the conductor ejected her from the train, putting her off at a small station on the road. She brought her suit against the company for thus being ejected from the train; the jury found a verdict in her favor, and the railroad company moved for a new trial, which the court overruled, and it excepted, alleging as

error the several grounds taken in the motion. This is the case which is presented to us for decision.

The first four grounds of the motion for a new trial are the usual ones, that the verdict is contrary to law and the evidence, against the weight of the evidence and without evidence to support it, contrary to the principles of equity and justice, and excessive. We do not think the verdict is contrary to law or the evidence, or strongly and decidedly against the weight of the evidence, as will be seen hereafter. Neither do we think the verdict is excessive.

The first special assignment of error is because the court charged the jury as follows: "When a railroad company undertakes to sell tickets and has an agency for that purpose, and they sell a wrong ticket and injury ensues, the company is liable. The law does not require a person dealing with a ticket-agent to examine his ticket and see what it purports to be, but places upon the railroad company, through its agent, the responsibility of giving the ticket applied for. If you are satisfied from the evidence submitted that she applied for a ticket from Aiken, S. C., to Atlanta, Ga.; that she paid her fare or the charges for such a ticket, then she had the right to presume that she had been given a ticket which would give her the passage sought." This charge of the court is assigned as error as being contrary to law. See the case of *Georgia R. R. v. Olds*, 77 Ga. 673, in which we think this point is substantially ruled in favor of the charge of the court. See also case of *Hufford v. Grand Rapids, etc. R. R. Co.*, 31 N. W. Rep. 544, decided by the Supreme Court of Michigan, in which it was held that "Where a passenger, who has purchased a ticket of the authorized agent of a railroad company, believing in good faith that it is genuine, and issued by the company, and such as the agent had a right to sell, states such facts to the con-

ductor of the train, such conductor is bound to take such facts as true until the contrary is proven, without regard to any words, figures or other marks on the ticket; and where, upon such passenger's refusing to pay fare, the conductor lays hands upon him with the purpose of removing him from the train, the conductor is guilty of assault and battery, for which the company is liable in damages." In the present case it appears that the passenger stated to the conductor the circumstances under which she purchased the ticket, and furthermore stated that her trunk had been checked to Atlanta, her destination, upon such ticket (which the conductor subsequently ascertained was the fact), and that she had no money with which to pay her fare to Atlanta, notwithstanding all of which the conductor ejected her from the train. We think, under these circumstances, she had a right to recover damages from the railroad company. The conductor put her off at a way-station at night, in which place there were no accommodations, and she had to walk some two and a half miles in order to secure a place to stay at. We think she had a right to rely upon the ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same, such conduct upon the part of the railway company and its agents authorized her to recover damages. Nor are we prepared to say that the damages recovered in this case are excessive. The plaintiff was a colored woman, old and infirm and in bad health, and was returning to Atlanta on account of her husband's death. We think, therefore, that the case we have referred to fully sustains this view.

It is further alleged as error that the court charged

the jury as follows: "If she asked for the ticket and there was no mistake on her part in calling for it, and the wrong ticket was given her, then it was the fault of the railroad company." It is alleged that this charge is contrary to law. We think not.

Exception is also taken to the following charge of the court: "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrong-doer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. In some torts the entire injury is to the peace, happiness or feelings of the plaintiff; in such cases no measure of damages can be prescribed, except the enlightened consciences of impartial jurors. The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed. . . If, reviewing the testimony, you feel that the circumstances proven are such as to require damages to deter the wrong being repeated, you should consider all these circumstances." Counsel for the plaintiff in error contend that, although the principle of law as given in charge is correct, there were no facts developed by the evidence in the case that authorized or called for such a charge. The charge in this case is consonant and in conformity with the code of this State (§3066), and we think the evidence developed sufficient facts to authorize the same. It was shown by the plaintiff in the court below that she had no money with which to pay her fare; and it was shown that the defendant, who is the plaintiff in error here, was a corporation and was operating a railroad. Thus, we think, the worldly circumstances of the parties were in some measure before the jury to be considered by them, if the charge was otherwise correct.

It is further alleged that the court erred in refusing

to give the following written requests to charge, made by counsel for the plaintiff in error: "No person shall recover from a railroad company for injury to himself or his property where the same is done by his consent, or is caused by his own negligence." "If the plaintiff, by ordinary care, could have avoided the consequences to herself caused by the defendant's negligence, she is not entitled to recover." "If the plaintiff was on the train of the Georgia railroad without a ticket which entitled her to be there, but on the contrary, with a ticket which plainly, on its face, showed that she did not have that right, and she, as well as the agent who sold the ticket, was chargeable with the mistake by which she had the wrong ticket, she should have paid her fare and called upon the railroad company to rectify the mutual mistake. And when, under the circumstances, she was required to leave the train she had no cause of action against the company for such expulsion." If what we have already said be correct, and we think it is, the court was right in refusing to give these requests to charge.

Again, it is insisted that the court erred in refusing to give the following written request to charge: "If the jury believe that the ticket-agent who sold the wrong ticket to plaintiff intended in fact to sell her the right ticket; that his failure to do so and his selling her the wrong ticket resulted from a negligent mistake only, unmixed with bad faith or malice; and if the mistake was apparent on the face of the ticket, and the plaintiff could have discovered it by merely looking at her ticket, then she was as much chargeable with the mistake as the agent was; it was her mistake as well as his, and she cannot recover damages on account of anything which flowed naturally from her own mistake." We think the court was right in refusing to give this charge to the jury. If the law is as we think it is, a

party purchasing a railway ticket has a right to rely upon the agent of the company to give him a proper ticket when called and paid for; and no peculiar circumstances intervening, there is no duty upon the person purchasing to examine the same; and any mistake which may occur is chargeable to the railway company, and not to the person receiving or purchasing the ticket. We therefore think there was no error in refusing to charge as requested.      *Judgment affirmed.*

SIMMONS, Justice, dissented.

## CASES DECIDED

AT THE

# MARCH TERM, 1891.

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86 755

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### GILL v. THE STATE.

Written authority from the parent or guardian for selling or furnishing intoxicating liquors to a minor must be special for each occasion. A general permit or license for the minor to drink beer and whisky in a specified bar-room, without limitation as to time or quantity, is void.

March 4, 1891. Argued at the last term.

Criminal law. Liquor. Minors. Parent and child. Before Judge SMITH. Muscogee superior court. May term, 1890.

Indictment for selling liquor to a minor without written authority first obtained, and in a second count for permitting the same to be done by a clerk in his employ. The defendant admitted that he sold liquor to the minor only after the 1st of February, 1889. There was no evidence that he sold any before that date, the testimony for the State being that the minor drank liquor in the bar-room of which the defendant was one of the proprietors, several times during 1889—once during the month of May. The minor's father testified that he controlled the minor, and about a year and a half before the 21st of June, 1890, gave Miller & Gill (the defendant's firm) written authority to let the minor play pool and drink whiskey and beer at their bar. A paper was exhibited to him, and he said it was the one he signed. The defendant offered it in evidence, but the court rejected it on the ground that it was not such a written authority as is contemplated by law. It was as follows :



"I do certify that I am perfectly willing for my son Willie to play pool and drink whiskey and beer in Miller & Gill's bar-room at any time. February 1st, 1889. PAT WALSH."

After verdict of guilty, the defendant moved for a new trial on the general grounds, and because of error in not admitting the paper. The motion was overruled, and exception was taken.

MARTIN & WORRILL, for plaintiff in error.

A. A. CARSON, solicitor-general, by C. J. THORNTON, *contra*.

BLECKLEY, Chief Justice.

The indictment was under section 4540(a) of the code, which reads as follows: "No person or persons, by himself or another, shall sell, or cause to be sold, or furnished, or permit any other person, or persons, in his, her, or their employ, to sell, or furnish any minor or minors, spirituous or intoxicating, or malt liquors of any kind, without first obtaining written authority from the parent or guardian of such minor, or minors, and such person, or persons, so offending shall, on conviction, be punished as prescribed in section 4310 of the code." This statute is a police regulation, and has regard, not alone to the will and wishes of parents and guardians over the conduct of children, but chiefly to the wholesome restraint and discipline of minors as immature members of society. It relies upon parental discretion, and intends that that discretion shall be exercised by the parent or guardian and not delegated to the child. It has no thought of empowering the parent to make the child the judge of its own needs for intoxicating liquors, without limitation as to time or quantity. On the contrary, the foundation principle of the law is, that the minor's discretion is not to be trusted. Hence it requires a decision of the parent or guardian, evidenced by writing. A parental decision not founded

on the circumstances of any particular occasion, but applicable alike to all occasions, and measuring the supply of liquors to be furnished by nothing but the desires and appetites of the child, is simply an effort to repeal the law *pro tanto*. To give it effect would be in direct conflict with the principle announced by this court, during the prevalence of slavery, in the case of *Reinhart v. The State*, 29 Ga. 522, in which it was held that the master's discretion to determine the quantity of spirituous liquors necessary for the health of a slave could not be delegated. Consistently with the policy of the law, there can be no general authority by the parent conferred upon any one to furnish liquors at his own pleasure or the pleasure of the child. The parent must hold control of the supply, both as to time and quantity, and the written authority must be special, as contradistinguished from general. It must be applicable to one occasion only, and must be repeated separately for each subsequent occasion. Once acted on, it is exhausted, and is no more authority for subsequent supplies than if it had never existed. Parental license to run indefinitely would, if granted by a sufficient number of rash and inconsiderate fathers, enable one or more drinking saloons in large cities to flourish on the patronage of minors alone. We think such a license shows on its face an attempted evasion of the law. It treats the parent alone as interested in the conduct of the child, and ignores the wider and more important policy of the statute, which is to rear good citizens and conserve the public order and general welfare of the State. If we are correct in what has been said, the instrument relied upon as a defence in this case was void upon its face. It was no authority for selling or furnishing even in a single instance, for it had no limitation as to time or quantity, and was obviously intended as a general license rather than as a particular author-

ity. It was an unlimited permit to drink whisky and beer in the bar-room of which the defendant was one of the proprietors. We have not overlooked the case of *Mascowitz v. The State*, 49 Ark. 170, 4 S. W. Rep. 656, but notwithstanding our high respect for the court which decided it, we cannot accept it as a precedent. It refers to no authority, and to our minds, its reasoning confounds the just distinction between police and civil liability.

There was no error in excluding the evidence, nor in refusing to grant a new trial on other grounds.

*Judgment affirmed.*

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DIXON v. THE STATE.

1. Unless the witness has deceived and entrapped the party introducing him, such party cannot impeach his credit by evidence of his previous declarations at variance with his sworn testimony. This rule applies to the State in criminal prosecutions.
2. Written orders from a parent to a liquor dealer, requesting him to supply beer and whisky to a minor whenever he wants them, are void. They contravene the police policy of section 4540(a) of the code.

March 4, 1891. Argued at the last term.

Criminal law. Liquor. Minors. Parent and child. Evidence. Witness. Before Judge SMITH. Muscogee superior court. May term, 1890.

Reported in the decision.

MARTIN & WORRILL, for plaintiff in error.

A. A. CARSON, solicitor-general, by C. J. THORNTON, *contra*.

BLECKLEY, Chief Justice.

1. No doubt the court erred in admitting the evidence of several witnesses to the previous sayings of Walsh, thereby contradicting a portion of his testimony given in as a witness for the State. He testified he never

told them so and so; they testified he did. The only relevancy of their evidence was to impeach him. It proved nothing in and of itself pertinent to the case. It was not competent for the State to discredit its own witness by showing that he had made statements out of court which he denied while testifying for the State in court. This is the rule applicable to parties generally, and there is no good reason why it should not affect the State in criminal prosecutions. It was applied in *McDaniel v. The State*, 53 Ga. 253, without any suggestion of a distinction between civil and criminal cases. The code, §3869, announcing the general rule but dispensing with it where the party has been entrapped by the witness, is broad enough to cover all cases alike. Here the solicitor-general did not profess to have been entrapped or misled.

2. But this error did no harm. The State's case did not rest on the evidence of Walsh in any degree, but was established by other witnesses, who proved the minority of Willie Walsh and that he was seen drinking whisky and beer in the defendant's bar-room in the year 1889. The defendant replied in his statement to the jury that he never let Willie Walsh have whisky or beer until the written orders were given by his father. These orders, one bearing date December 3d, 1887, the other September 11th, 1888, were void on their face, being in their terms too general and indefinite, as we have just ruled in the case of *Gill v. The State*. They contravene the police policy of section 4540(a) of the code. One of them is addressed to Dixon & Herring, the other to D. W. Dixon, each of them saying: "Please let my son Willie have whiskey and beer whenever he wants it." This was no judgment by the father of the needs and wants of his son, but was an effort to delegate to the son the power of judging for himself both as to time and quantity. The policeman

appointed by law cannot abdicate, nor delegate his functions to the person over whom they are to be exercised.

The verdict of the jury was correct, and so was the refusal of the court to grant a new trial.

*Judgment affirmed*

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LAING v. THE MAYOR AND COUNCIL OF AMERICUS.

1. Without express statutory authority, a municipal government cannot grant to any person the right to erect and maintain in a public street a structure, such as a permanent fish-box, for his private and exclusive use.
2. The charter of Americus invests the city council with full power to clear the streets of all obstructions, and this power may be exercised summarily and without granting a preliminary hearing, after notice to remove and refusal.
3. A license from the city to carry on the business of a fish dealer, etc., gives no vested right to keep a box in the street and use it in the business.
4. Where the whole case turns upon a question of law, which is decisive of its merits, the court may direct a verdict for the defendant. Even if this be irregular, it is no cause for a new trial where a recovery would be impossible.

March 4, 1891. Argued at the last term.

Municipal corporations. Streets. License. Practice. New trial. Before Judge ROBERTS. Sumter superior court. November adjourned term, 1889.

Reported in the decision.

SIMMONS & KIMBROUGH, L. J. BLALOCK and HOYL & PARKS, for plaintiff.

B. P. HOLLIS, E. A. HAWKINS and HARRISON & PEBPLES, for defendant.

BLECKLEY, Chief Justice.

The plaintiff located his fish-box, a structure nine feet long, three feet wide and two and one half feet high, in one of the public streets of Americus, intending it to be permanent and believing that he had the con-

86	756
98	72
86	756
112	787
112	788
86	756
126	476

sent of the city council so to do. Certain members of the street committee of the council gave their consent expressly, co-operated with him in selecting the site, and gave direction as to how and where the contrivance for drainage of the box should be placed. Considerable expense was incurred by the plaintiff in procuring the box, putting it in position and supplying it with the needful apparatus for drainage. He was a licensed fish dealer and restaurant keeper, and renewed his license whilst using the box in connection with his business. The renewed license had a considerable length of time to run when the city, in January, 1888, after the box had stood in the street for about fifteen months, removed it without his consent and in spite of his objection. This was not done, however, until after he had been notified to remove it and had positively refused to do so. Having no place on any premises under his control on which such a box could be located, he could make no further use of it in his business, and the result was, that his business as a fish dealer was broken up. He brought his action against the city for damages, and after hearing all the evidence offered by both parties, the court directed the jury to return a verdict for the defendant.

1. It is not pretended that the municipal government of Americus had any express statutory authority to farm out the public streets to fish dealers or to any one else. Without such authority, they could not grant to any citizen the right to maintain a permanent structure for private use in any of the streets. 2 Dill. Mun. §660. Any license, therefore, which the city granted or could grant to the plaintiff to occupy the street with his fish-box was necessarily temporary and revocable. Even if both parties had intended it to be permanent, such intention would be of no effect. So far from there being cause for complaint that the structure was al-

lowed to stand only fifteen months, it was a matter of indulgence to the plaintiff, and something to which he had no legal right, that it was allowed to be placed there at all. His real grievance is that he made a mistake in supposing that he was securing a right which the city authorities had no power to confer upon him. In dealing with public agents, every person must take notice of the extent of their powers at his peril; and only by gross neglect to inform himself could any one having the requisite capacity to deal in fish fall into the error of supposing that he could acquire for his own exclusive use the right to occupy permanently sixty-seven cubic feet of space in a public street. It matters not that a permanent structure for private enjoyment in a street or highway is confined to a part little used or not used at all, it becomes a nuisance as an encroachment upon the public right. *Elliott Roads & Streets*, 477 *et seq.*; *Wilbur v. Tobey*, 16 Pick. 177; *Emerson v. Babcock*, 66 Iowa, 257; *The State v. Berdett*, 73 Ind. 185. It was no reason for not removing the obstruction that the plaintiff had incurred expense in erecting and maintaining it. *Winter v. City of Montgomery*, 83 Ala. 589, 3 So. Rep. 235. The suggestion that the city would be estopped, as in *City of Atlanta v. Gate City Gas Co.*, 71 Ga. 107, is without relevancy, for in that case the gas company had a charter from the legislature; the city had power to give consent, and consequently could be estopped from denying that it had given it. And where the power to consent exists and has been exercised, the city may be estopped to revoke needlessly and to the injury of the other party. *Town of Spencer v. Andrew* (Iowa, 1891), 47 N. W. Rep. 1007.

2. The charter of the city of Americus, section 20, declares that the said Mayor and Council of Americus shall have full power and authority to remove or cause to be

removed, any building, posts, steps, fence or other obstruction, or nuisance, in the public streets, lanes, alleys, sidewalks, or public squares of the city. Acts 1873, p. 114. This power was ample, and was duly exercised in the present instance. The plaintiff was notified according to the city ordinance to remove the box, and refused to do it. On the facts in evidence, looking to his testimony alone, there was good cause for removing it, and his complaint that he was denied a hearing by the city council is of no significance. To abate nuisances elsewhere than in the public streets, a preliminary hearing would generally be necessary; but to clear the streets of palpable obstructions, no such hearing is required. The plaintiff has now had a full hearing in the superior court, and has failed to show any legal reason why his box should remain in the street. It was not the want of a hearing, but the lack of any legal right that exposed him to loss.

3. The plaintiff's license as a fish dealer or a restaurant keeper did not confer any right upon him to use the street permanently and exclusively as an annex to his premises and an adjunct to his business. We have referred to the transcript of the record of file here in the case of *City of Atlanta v. Dooly*, 74 Ga. 702, and find that the bill-board involved in that case was located upon private property extending along the margin of the street, and not upon the street itself or sidewalk. It was that circumstance that made the ruling in that case correct. The license granted to Dooly as a bill-poster was not claimed to comprehend the right of maintaining bill-boards in the public streets, but only to cover the privilege of exercising the business on adjacent lands. The city officials seized and removed a board thus located. No act of merely clearing obstructions out of a street was under consideration in that case.

4. After all the evidence was in, the plaintiff's right



to recover turned exclusively upon a question of law. That question was against him. It was not possible for the jury to render any verdict in his favor which could be upheld. This being so, no good reason occurs to us why the court could not direct a verdict for the defendant. But even if such direction was irregular, it was harmless, and it would be idle to require a new trial. *Hobby v. Alford*, 73 Ga. 791; *Cothran v. Rome*, 77 Ga. 582. Construing the evidence most favorably for the plaintiff, and treating all conflict in it as settled adversely to the defendant, the verdict was correct.

*Judgment affirmed.*

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WEEMS v. JONES. WEEMS v. AMERICAN MORTGAGE CO.

Interest and usury.

SIMMONS, J.—The material facts in both of these cases are the same, and both are ruled by the case of *Merck v. American Freehold Co.*, 79 Ga. 213. *Judgment affirmed.*

March 4, 1891. Argued at the last term.

From Chattahoochee superior court, September term, 1889. Before Judge SMITH.

E. J. WYNN and C. J. THORNTON, for plaintiff in error.  
W. E. SIMMONS, *contra*.

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COOK *et al.* v. BUCHANAN.

An affidavit of illegality may be made by an agent, and the agency need not have been created in writing.

March 4, 1891. Argued at the last term.

Illegality. Principal and agent. Before Judge SMITH. Marion superior court. April term, 1890.

Reported in the decision.

MORGAN McMICHAEL and C. J. THORNTON, for plaintiffs in error.

BUTT & LUMPKIN, *contra*.

SIMMONS, Justice.

Buchanan foreclosed in a justice's court a chattel mortgage against Rebecca Everingham and John W. Cook. Execution was issued thereon and levied on the mortgaged property. An affidavit of illegality was filed by McMichael as special agent of the defendants. A trial was had in the justice's court and judgment in favor of Buchanan was rendered against the defendants, and they entered an appeal to the superior court. When the case was called in the superior court, Buchanan demurred to the affidavit of illegality, on the ground that it was filed by a special agent of the defendants, the authority for so doing not accompanying and not being filed with the affidavit. The court sustained the demurrer and dismissed the illegality, and the defendants excepted.

The sole question to be decided is, whether an agent can file an affidavit of illegality in behalf of his principal without a written power of attorney authorizing him to do so. Section 2207 of the code is as follows: "Any act authorized or required to be done under this code by any person in the prosecution of his legal remedies, may be done by his agents; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency be created by parol. In all such cases, if the principal repudiate the act of the agent, the agent shall be personally bound, together with his sureties." We think that under this section of the code, an agent can make an affidavit of illegality, and that it is not necessary, in order for him to do so, that the agency should be created in writing as contended by counsel for the defendant in error. This section expressly declares that the agency may be created by parol. The word "parol" as applied to cases of illegality does not, in our opinion, mean a writing, but means a verbal creation of the agency. Under this

section, whenever the principal is authorized or required to do an act in the prosecution of his legal remedies, he may appoint an agent verbally to do the act for him, if the agent can conscientiously depose to the same facts to which the principal could. In the case of *Hadden v. Larned*, 83 Ga. 636, this court held that under this section an agent could not interpose a claim affidavit *in forma pauperis*, because that affidavit is a personal privilege to the claimant and the agent could not depose as to the *bona fides*, belief and poverty of the claimant. He could not swear positively that the claim was made in good faith or that the claimant was from his poverty unable to give good bond and security. Nor can an agent created by parol under this section, enter an appeal, because section 3615 expressly requires that if an agent enters an appeal, he must be authorized in writing and the writing filed in the court in which the case is pending. In the case of an illegality there is no reason why the agent cannot depose to the same facts as the principal could. He can have the same knowledge as to the illegality of the execution as the principal has, and can depose as positively to the grounds of illegality generally as the principal could.

We think, therefore, that under this section any person, in the prosecution of his legal remedies, may appoint verbally an agent to act for him therein, unless it is apparent that the agent cannot make the affidavit required by law, as in the case of *Hadden v. Larned*, *supra*, or as in the case of an appeal, where the code provides that the appointment shall be in writing. If the sheriff or other levying officer is satisfied that the agent has the necessary authority to make the affidavit, he may receive it and return the paper to the court. If, however, the agent has no such authority, this section of the code allows the principal to repudiate the action of the agent, and in that event the agent and his

securities become liable; and this is the difference between this section and section 3670, which says an affidavit of illegality may be filed by an attorney in fact or an executor, administrator or other trustee. Under the latter section a person undoubtedly would have the right to appoint an attorney in fact to file an affidavit for him. If he does appoint an attorney in fact, it must necessarily be in writing and must be executed with the same formality as the law prescribes for the execution of the act for which the agency is created, as required by section 2182 of the code. Where an agent is appointed in this manner, the principal cannot repudiate his acts, as he can do under the other section. The facts in this case show that while this agent was appointed by parol, the principals ratified his action by appealing the case from the justice's court to the superior court, and giving the appeal bond required by law, and by appearing in the superior court and offering to subscribe their names to the affidavit. If there could be any doubt as to the legality of the agency, this ratification on the part of the principal was sufficient to authorize the court to hear and determine the illegality.

*Judgment reversed.*

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McLENDON v. HOLLIS.

Practice in Supreme Court.

SIMMONS, J.—This case was not brought here in compliance with the act approved November 11th, 1889, and as that act provides that no case shall be brought here by bill of exceptions except in the manner prescribed therein, we are without jurisdiction to hear and determine the case made in this bill of exceptions.

March 4, 1891. Argued at the last term.

*Writ of error dismissed.*

WILLIS & MATHEWS, by brief, for plaintiff.

No appearance for defendant.

WILKINS, next friend, *et al.* v. McGEHEE.

1. A power given by mortgage to sell the land covered thereby for indemnity to the mortgagee, if she had to pay a note of previous date on which she was security for the mortgagor, was revoked by the mortgagor's death before the note fell due. It follows that a sale of the land under that power, made after the death of the mortgagor, was void and conveyed no title to the purchaser.
  2. The mortgagor's executors (who sue as such, and also as trustees under the will of the mortgagor, and as next friend of a minor beneficiary) are not estopped from contesting the validity of the sale, they having been present thereat but having done or said nothing in regard to the matter, and having made no representation as to the title or the right of the mortgagee to sell, and the purchaser being the mortgagee's son and agent who advertised the land for sale and who had as much knowledge of the state of the title as the plaintiffs, and all parties having acted in good faith under the belief that the power of sale was still valid when the sale occurred. Any doubt of this conclusion would be overcome by considering the difference between estopping one who acts as an individual and one who acts in a representative capacity.
- (a) It is not held that the purchaser has no remedy. He can still set up his mortgage by way of cross-bill to the action of ejectment, have the mortgage foreclosed and the land sold, and be paid the amount due on the mortgage with interest.

March 4, 1891. Argued at the last term.

Ejectment. Sales. Powers. Revocation. Title. Mortgages. Estoppel. Administrators and executors. Before Judge SMITH. Muscogee superior court. May term, 1890.

Action of ejectment on the demises of C. B. Wilkins as next friend of Georgia M. Wilkins, of C. B. Wilkins and John Flournoy as trustees of Georgia M. under the will of Julia M. Wilkins, and of Wilkins and Flournoy as executors of Julia M. Wilkins. Julia M. Wilkins originally had title to the property and died in possession of it, leaving a child, Georgia M., and a will in which no specific mention was made of the property, but in which Wilkins, Flournoy and Swift, in trust for her daughter, were named as residuary lega-

tees and powers given them as to sale, exchange and reinvestment of property bequeathed to the daughter. Wilkins, Flournoy and Swift were also named as executors. Before her death Mrs. Wilkins and her grandmother, Mrs. Mustian, executed a note for \$4,095, and a few days thereafter Mrs. Wilkins entered into a writing reciting that, in consideration of the fact that Mrs. Mustian had endorsed the note for her, she sold to Mrs. Mustian the property in dispute, upon the condition that if she, Mrs. Wilkins, paid or caused to be paid the note in full when it became due, then this conveyance was to be null and void; that if she should fail to do so and Mrs. Mustian should pay it, then Mrs. Mustian was authorized to enter upon and take possession of the property, and sell it at public auction in front of the court-house door of the county in which it was located, after giving certain specified notice, the sale to be for cash and the proceeds of the sale to be applied to the expenses of the sale, to the payment of whatever Mrs. Mustian should pay or be required to pay on the note, and the overplus to be paid to Mrs. Wilkins. The writing contained the further agreement, that Mrs. Mustian might bid for and purchase the property at the sale as if she were a stranger "to this mortgage," and in the event she became the purchaser, the auctioneer who might make the sale was authorized to execute titles to her. Before the note became due Mrs. Wilkins died. It was presented for payment to Mrs. Mustian, and one Davis, as her agent, presented it or had it presented to Flournoy and Swift as trustees and as executors, to see if they could not arrange to pay it as such, and they did make an effort to do so, having in their hands some property which came from Mrs. Wilkins' estate, but did not or could not pay it, and Mrs. Mustian had to pay it. They made no objection to her having a sale to reimburse herself, and it was sold after

advertisement, etc., publicly, for cash, Davis bidding it in for enough to cover the note with interest and cost. Flournoy and Swift knew the sale was to be made, and both were probably present when the sale was made, Wilkins being then out of the State. When Davis took possession no objection was made, and no question made as to the validity of the power under which the sale was made; neither Swift, Flournoy nor Wilkins ever paid him back the money he paid for the property, or made any demand for the possession of it; a short while afterwards Mrs. Mustian made a deed to him, and he sold it to the present holder for a small advance, which was then a fair price for it.

The verdict was for the defendant, and a motion for new trial having been overruled, the plaintiffs excepted.

LOUIS F. GARRARD, for plaintiffs.

PEABODY, BRANNON & HATCHER, for defendant.

SIMMONS, Justice.

There are two questions made for our decision by the record in this case: (1) The first is whether the power of sale given by Mrs. Wilkins to Mrs. Mustian survived after the death of Mrs. Wilkins the maker. (2) If the power did not survive, or was revoked by her death, whether the plaintiffs in the court below are estopped from setting up their claim to the land.

1. The first question depends upon the nature of the conveyance to Mrs. Mustian, whether it gave her such an interest in the land as to render the power of sale irrevocable by the death of Mrs. Wilkins. As a general rule, all powers are revoked by the death of the person creating the power. The exception to this general rule is where the power is coupled with an interest. If the power is coupled with an interest, then the death of the maker does not revoke it. But to render it irrevocable, the interest must be in the property itself, and not merely in the proceeds resulting

from the execution of the power. Code, §2183; *Hunt v. Rousmanier*, 8 Wheat. 175; *Lockett v. Hill*, 1 Woods, 552; *Coney v. Sanders*, 28 Ga. 511; *Lathrop v. Brown*, 65 Ga. 315. Marshall, C. J., says in the case first cited: "We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing." In this case, in order for the power to have survived, Mrs. Mustian must have had some title or estate in the land. Did she have such a title, estate or interest as to render the power irrevocable? We think not. In our opinion, the conveyance to her by Mrs. Wilkins was nothing more than a mortgage to secure her against loss, in the event she had to pay the note on which she was security for Mrs. Wilkins. It was not the intention of either of the parties that the title to the land should pass from Mrs. Wilkins to Mrs. Mustian. The money was not borrowed by Mrs. Wilkins from Mrs. Mustian, but from another party. The conveyance was not made at the time the note was given, but subsequently thereto, for the purpose of indemnifying Mrs. Mustian in case Mrs. Wilkins failed to pay the note and she had it to pay. There is no warranty of title in the conveyance, and it is denominated a mortgage therein. So we think the real intent and understanding of the parties were that it was a mortgage. Being a mortgage, under our code it did not convey the title but was only a security for the debt. Code, §1954. As this instrument passed no title to Mrs. Mustian, she did not get any estate in the land, but only an interest in the proceeds of the sale thereof. She had an interest in the power but none in the thing. Such an interest does not render the power irrevocable by the death of the maker, and therefore the death of Mrs. Wilkins revoked the power of sale contained in



the mortgage. *Lathrop v. Brown*, 65 Ga. 312; *Miller v. McDonald*, 72 Ga. 20; *Lockett v. Hill*, *supra*; *Hunt v. Rousmanier*, *supra*; *Johnson v. Johnson*, 27 S. C. 309, s. c. 3 S. E. Rep. 606. It was contended, however, by counsel for defendant in error, that this court, in the case of *Calloway v. The Bank*, 54 Ga. 441, held that a mortgagee did have such an interest in the mortgaged property as to make the power of sale therein irrevocable. It is true that Judge McCAY, in his reasoning in that case, did say that the mortgagee had an interest in the mortgaged property. While the decision in the case was right, we think, from the authorities above cited, that the reasoning to sustain it was not well founded. In that case, Maxwell, the mortgagor, was not dead, nor was there any effort on his part to revoke the power of sale given in the mortgage. The attack on the power of sale seems to have been made by unsecured creditors of Maxwell. Under the facts of that case, the power of sale could very well be held irrevocable, because they show that the contract between Maxwell and the mortgagees was that, on default of payment of the sum of money secured by the mortgage, the mortgagees were not to be delayed by the necessity of foreclosing in the courts, but either of them might sell all or any part of the lands to pay said indebtedness, after advertising, etc. Maxwell was not dead at the time of the sale; and the power, being part of a contract for consideration, might for that reason be held irrevocable in the lifetime of the mortgagor. In *Lathrop v. Brown*, JACKSON, C. J., commenting upon that case, said: "And though Judge McCAY in the 54 Ga. does express the opinion that the mortgagee has such an interest in the thing mortgaged as to make the power irrevocable, yet he could not have meant, and did not mean, that it survived the death of the mortgagor, so as to defeat costs of administration, year's support, widow's dower and trust debts." 65 Ga. 317.

2. Having determined that the power of sale given to Mrs. Mustian in the mortgage was revoked by the death of Mrs. Wilkins, it follows that the sale of the land under that power, made after the death of Mrs. Wilkins, was void and conferred no title on the purchaser. It only remains for us to decide whether the plaintiffs were estopped by their conduct at the sale. The facts of the case show, in substance, that Mrs. Wilkins died before the note, upon which Mrs. Mustian was security, fell due; that when it became due, Davis, the son and agent of Mrs. Mustian, went to the plaintiffs to see if they could raise the money to pay the note; they endeavored to do so, but failed. The note was then paid by Mrs. Mustian. Davis as her agent then had the land advertised for sale under the power given in the mortgage. On the day of sale he became the purchaser, and Mrs. Mustian executed to him a deed to the land. Two of the plaintiffs were present at the sale, but did not do or say anything in regard to the matter. They made no representations as to the title to the property or the right of Mrs. Mustian to sell it. Davis knew as much about the title as they did. He, being the agent of Mrs. Mustian and having had the property advertised, must have had the mortgage with the power of sale in his possession. Besides, Mrs. Wilkins, as the record shows, was his sister. He thus had as much knowledge of the true state of the title as the plaintiffs had. Indeed, he had better means of acquiring such knowledge than they had. Under this state of facts, we do not think that the plaintiffs are estopped. He was not influenced to make the purchase by any act of theirs, either of omission or of commission. They did not practice any art or deceit. There was no false suggestion, no suppression of truth by them. They were not guilty of any fraud; but, on the contrary, it was admitted in the argument here

that all parties acted in perfect good faith under the belief that the power of sale was still valid when the sale took place. It was an honest and mutual mistake of law. The purchaser was as much bound to know the law as the plaintiffs. All of them being equally ignorant, it is now claimed in behalf of the purchaser that the plaintiffs became estopped by not informing him truly of the law. We know of no law requiring one who is present at a sale like this to act as the legal adviser of an adverse party, or else become forever estopped from contesting the validity of the sale. The law of equitable estoppel, as respects the title to real property, is clearly stated thus by the Supreme Court of the United States: "For the application of the doctrine of equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. Where the estoppel relates to the title of real property, it is essential to the application of the doctrine, that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel." *Brant v. Va. Coal Co.*, 93 U. S. 326. The same principles appear in the following authorities: *Davis v. Davis*, 26 Cal. 23, and cases cited, s. c. 85 Am. Dec. 157; *Chellis v. Coble*, 37 Kans. 558, s. c. 15 Pac. Rep. 505; 2 Herman on Estoppel, §§957, 948 *et seq.* And see *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51 and notes; *Crest v. Jack*, 27 Am. Dec. 353; *Johnson v. Ins. Co. (Ky.)* 2 S. W. Rep. 151; *Martien v. Norris*, 91 Mo. 465, s. c. 3 S. W. Rep. 849.

Section 2966 of the code is in these words: "A fraud may be committed by acts as well as words; and one who silently stands by and permits another to purchase his property without disclosing his title is guilty of such a fraud as estops him from subsequently setting up such title against the purchaser." In *Brown v. Tucker*, 47 Ga. 485, this court held that the section quoted only operates in favor of a *bona fide* purchaser without notice. Granting that the executors stand, in this respect, on the same footing as an owner, still the purchaser in this case does not fill the description, because he was fully acquainted with the facts involving the title, and there was consequently nothing more of which he could be notified.

So far we have treated the executors who are the plaintiffs in this case, as if they were the real owners of the land in dispute, and concluded that they are not estopped. If any doubt attended this conclusion, it would be overcome by considering the wide difference between estopping one who acts as an individual and one who acts in a representative capacity. Where an administrator makes an unauthorized sale of property belonging to the estate, he will not be estopped from recovering it back. *Worthy v. Johnson*, 10 Ga. 358; *Gouldsmith v. Coleman*, 57 Ga. 425. The estoppel works against the individual, so that he cannot shun personal liability by pleading his want of authority, but in many cases does not work against the estate. Thus in *Sellers v. Cheney*, 70 Ga. 790, it is held: "That an administratrix stood by and saw property of the intestate sold under a void *fi. fa.* will not estop the administrator *de bonis non* who succeeded her from attacking the validity of the sale." In *Magee v. Gregg*, 11 Sm. & M. 70, it was held that an administrator who was present at the sale of a slave belonging to his intestate, made by another person, and offered no objection to

the sale, could recover the slave from the purchaser; that he might be estopped of his individual rights, but not deprived of his fiduciary right, by such implied assent. See also *Lewis v. Lusk*, 35 Miss. 696, 72 Am. Dec. 153, where it is said that an estate cannot be prejudiced or estopped by the mere silence of the administrator, or by his omission to assert title, or to do an act in relation to its interest. In the present case the plaintiffs declared on three counts, one as executors, another as trustees under the will and another as next friend of the minor beneficiary, and we are asked to hold that they are estopped in all three characters. In addition to the above authorities, we may in answer refer to the case of *Groover v. King*, 46 Ga. 101, in which WARNER, C. J., says: "Although the minor heirs of the intestate may have had a guardian, and that guardian may have receipted to the administrator for their share of the proceeds of the sale of the land without any knowledge of the illegality of the sale, as the evidence in the record shows, they were not estopped from asserting their claim to the land when they obtained a knowledge of such illegal sale, and it was error in the court to charge the jury that they were estopped. Estoppels are not generally favored by the courts, and it would be a very harsh rule to establish that the minor heirs in this case were estopped when their guardian had no knowledge of the illegality of the sale of the land. But in electing to set aside the sale they must account for what they have received from the sale of the land; they cannot have the land and retain the proceeds of the sale thereof." So here, in making this ruling, we do not intend to hold that the purchaser has no remedy. He can still set up his mortgage by way of cross-bill to the action of ejectment, and have it foreclosed and the land sold, and be paid the amount of the mortgage with interest thereon.

*Judgment reversed.*

## STUBBS v. THE STATE.

## Practice in Supreme Court.

BLECKLEY, C. J.—This case is controlled by the act of November 11th, 1889, prescribing the method of bringing cases to the Supreme Court. Moreover, the brief of evidence is a mere report of the trial by questions and answers, and is not such a brief as the law contemplates. *Writ of error dismissed.*

March 16, 1891. Argued at the last term.

HOYL & PARKS, by HARRISON & PEEPLES, for plaintiff in error.

J. M. GRIGGS, solicitor-general, by brief, *contra*.

## PAYTON v. PAYTON.

1. A husband who paid for land with his own money and took a conveyance in 1881, describing himself in the deed as trustee for his wife, acquired the property for her, and it became her separate estate both legally and equitably. The trust was executed as soon as created. *Sutton v. Aiken*, 62 Ga. 733.
2. Interference between husband and wife after their separation to control by interlocutory injunction the possession of the family dwelling, though it be her property, would generally be unwise. In the present case the discretion of the judge was not abused.

March 16, 1891. Argued at the last term.

Injunction. Husband and wife. Trusts. Before Judge BOWER. Dougherty county. At chambers, November 1, 1890.

The question made is, whether the judge erred in refusing to enjoin the defendant, on the petition of his wife, from interfering with a house and lot which he holds under a deed conveying the same to him as trustee for her, she contending that this deed vested the title absolutely in her, and that he is an insolvent trespasser. The deed is dated June 20, 1881, and in consideration of \$400 conveys the property to "Ed Payton, trustee for Caroline Payton." She alleges that he purchased the property with money which she earned

86a	773
91	198
86a	773
108	147
86b	773
112	94

by her own labor ; that the house is vacant and bringing no income, and he will not rent it to any one nor allow her to do so ; that she formerly had much confidence in him, but they have been living apart for several years because of cruel treatment of her by him, he doing all in his power to bring her to absolute want and make her property worthless ; that she is now about fifty-five years old, and it is important to her that her property and what she can accumulate be preserved, protected and made productive ; that in September, 1890, she rented two rooms of the house to Henry Thomas, a good man and prompt payer of his obligations, for \$4 per month, which is a reasonable price, but when he attempted to take possession, he was stopped by the defendant by menaces and threats of prosecution, etc., and left the house vacant and will not live in it for fear of injury from the defendant, who is insolvent and cannot be made to answer in damages, and were it otherwise, his continued acts would necessitate a multiplicity of suits ; that she does not need any trustee, the title to the property being absolutely in her ; that the defendant has no right to interfere with it, whether she paid for it or whether he paid for it and took the deed for it to himself as trustee, she being long before its date more than twenty-one years old.

The defendant answered that he and his wife lived together many years in happiness, but for some years past, without his fault, she has become alienated from him and refused to live with him, through the influence of Henry Thomas and others, although defendant has used every means to induce her to return ; that about the date of the deed, he desired to provide a home for himself and his wife, they having no children, and he thinking it prudent when he was strong to make provision for the future, and with this desire he bought the property ; that the purchase money for it was paid by him

at different times, every dollar of it being his own money and the result of his own labor; that having perfect confidence in his wife's fidelity, and fearing that future financial embarrassments might come upon him and sweep away their home in old age, he requested the vendor to make the deed to him as trustee for his wife; that he is now sixty-five years old, infirm and unable to do much labor or earn much money, but he and his wife could by united effort earn enough to provide for their wants; that he is using the house as his home, and she could do the same if she would; that his reasons for not allowing Thomas to take possession were, that he and Thomas had for several years lived with their families together in the house, and Thomas was the cause of the alienation of his wife, disputed his title to the lot and forced him to litigate the title with him, which he did and gained the case; that this whole matter is a scheme concocted by Thomas and Mack Thompson, with whom his wife is now living, to get him out and sell the house to Thompson, and leave him in his old age without a shelter; that Thompson has persuaded his wife to sell the property to him at a price greatly less than its value; and that she is a weak-minded woman and has been thus the more easily controlled by the influences of said parties. By way of cross-bill, he charges that he acted in good faith and thought he took the surest method to provide a home for himself and wife when he purchased the lot, but as the consideration moving him to do so has failed, the deed to him as trustee is void; and he therefore prays that the vendor therein be made a party, that the deed be decreed void, and that the vendor be required to execute to him a fee simple deed to the property. He says that it would be a fraud upon him and against public policy for the trust under the deed to be enforced; and so he prays that the petitioner be enjoined from selling, mort-



gaging or interfering with the property except to occupy and enjoy it as his wife.

W. T. JONES, for plaintiff.

J. W. WALTERS, for defendant.

BLECKLEY, Chief Justice.

1. We have no doubt that Mrs. Payton, the plaintiff, has the exclusive title, legal and equitable, to the premises involved in the dispute between her and her husband. He paid for the property, but took a deed which described him as her trustee. This deed was executed in June, 1881, and is governed in all respects by the rule announced in *Sutton v. Aiken*, 62 Ga. 733.

2. Nevertheless, inasmuch as Mrs. Payton had separated from her husband, leaving him in possession of the property, which possession he still holds, we think he is not a trespasser in such sense as to make it obligatory upon the judge of the superior court, by a mere interlocutory injunction, to expel him from the possession, or to constrain him to admit into joint occupation with him a new tenant under Mrs. Payton. Judicial interference in a family quarrel of this nature should not be too summary. Very likely delay may have a salutary effect; the parties, left to themselves, may become reconciled, and may compose their differences. The granting of an injunction is discretionary in every case. Code, §3220. Not unfrequently the wisest exercise of this discretion is by non-intervention. This may be so in the present case. An interlocutory injunction is no finality, it settles nothing; only some final judgment can put an end to the controversy between these parties. When this is reached, there will be no longer any discretion as to admitting the plaintiff or her tenants into possession and turning the defendant out.

It will be noticed that this is no application for the appointment of a receiver.

*Judgment affirmed.*

## WILSON v. HERRINGTON, tax-collector.

86	777
1110	767
86	777
120	474

1. Unless a tax-execution paid off by one not a party to it is entered on the execution docket of the superior court as required by section 891(a) of the code, within thirty days after the transfer, it has no longer any force except as against the defendant only. As to all third persons it is extinguished.
2. But without payment in full, no legal transfer can be made, and such payment includes costs as well as taxes.
3. When, in a claim case, the levy has been improperly dismissed, the court may correct the error at the same term by reinstating the case on motion. A motion general in its language is sufficient, the error being apparent on the face of the record.
4. The omission of the tax-collector to attach an unsigned receipt to the execution, as required by the act of 1885, does not render the execution void but only irregular.

March 16, 1891. Argued at the last term.

Tax-executions. Practice. Before Judge ROBERTS.  
Pulaski superior court. May term, 1890.

An execution for State and county taxes against Ryan was levied upon a lot of land, describing it, but the levy did not state as whose land the lot was levied upon. A claim was interposed by Mrs. Wilson, and after the levy and claim the *fi. fa* was transferred by the sheriff to one Lewis, for the amount of the taxes due, exclusive of costs. When the case came on for trial and the *fi. fa.* was tendered in evidence, claimant moved that it be rejected and the levy dismissed, on the grounds that the levy did not state whose property the land was or anything to show that it was subject to be levied upon; that there was no receipt attached to the *fi. fa.* as required by law; that the *fi. fa.* had been fully paid up and satisfied as was shown by the entry on it of the transfer by the sheriff to Lewis, and the State and county had no longer any interest in it; and that more than thirty days had expired since the written transfer of the *fi. fa.* by the sheriff to Lewis, and the same had never been recorded as required by law, and because

of such default the *fi. fa.* had lost its lien and had become null and void. The court overruled all the grounds of the objection except the last, which was sustained. It is insisted that the court erred in not sustaining the other objections made. During the same term, the plaintiff in *fi. fa.* filed a motion to revoke the order of dismissal and reinstate the case. The claimant objected to this motion as not being the proper one in the premises, which objection was overruled and to this ruling exception is taken. The court then heard the motion and sustained it, and this also is excepted to.

A. C. PATE and MARTIN & SMITH, for plaintiff in error.  
No appearance *contra*.

BLECKLEY, Chief Justice.

1. If the tax-execution had been wholly paid off by Lewis, though this was done pending the claim, his failure to enter the execution on the execution docket of the superior court within thirty days after the transfer made to him by the sheriff would have justified the court in dismissing the levy, for the statute keeps such executions alive as to third persons only on condition that they are so entered. Code, §891(a). Though defendants against whom they are issued will still be affected by such executions where there has been a failure to enter them, claimants of property levied upon are entitled to treat them as extinguished or discharged. *Hoyt v. Byron*, 66 Ga. 351; *Murray v. Bridges*, 69 Ga. 644; *National Bank v. Danforth*, 80 Ga. 56; *Fuller v. Dowlall*, 85 Ga. 463, 11 S. E. Rep. 773; *Clarke v. Douglass*, 86 Ga. 125, 12 S. E. Rep. 209. It will be observed that so much of the section of the code above cited as is taken from the act of 1879 relates alone to tax-executions issued prior to February 20th, 1875. The execution now in question was issued in 1889 for State and

county taxes of 1888, and consequently is governed by the general terms of the prior statute and not by the special provisions of the act of 1879.

2. But the execution was not fully paid off. There remained due upon it one dollar for costs, and to collect this unpaid balance the tax-collector was entitled to proceed with the levy. He was so proceeding, and consequently the court erred in dismissing the levy because the *fi. fa.* had been transferred to Lewis by the sheriff and not recorded within thirty days thereafter. The sheriff had no authority to make the transfer, inasmuch as the execution was not paid in full. Lewis is no party to the claim case, nor is he a party in this court. The tax-collector is proceeding to subject the property levied upon, and he has a right to do this so long as anything remains unpaid on the execution.

3. The court having erred in dismissing the levy, the right way to correct the error was to reinstate the case on motion and set aside the erroneous judgment. This was done at the same term of the court, and there was no error in so doing. The motion made, though very general in its language, was sufficient, the error committed in dismissing the levy being apparent on the face of the record.

4. The provision of the act of 1885 (Acts of 1884-5, p. 67) requiring tax-collectors to attach an unsigned receipt to each execution issued for taxes, is directory, and the omission of that duty does not render the execution invalid. A claimant of property levied upon by virtue of an execution for taxes is not entitled to have the levy dismissed because no receipt is attached.

*Judgment affirmed.*

## MONROE v. STIGER.

## Practice in Supreme Court.

BLECKLEY, C. J.—This case is controlled by the act of November 11th, 1889, prescribing the method of bringing cases to the Supreme Court. *Writ of error dismissed.*

March 16, 1891. Argued at the last term.

J. L. SWEAT and L. A. WILSON, by brief, for plaintiff.  
S. W. HITCH, by brief, for defendant.

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MADDEN v. BLAIN *et al.*

The power of a married woman to contract as a free trader, under section 1760 of the code, is restricted by the general provision of section 1783 as to all married women, which disables them to bind their separate estate by any contract of suretyship. Hence, an accommodation acceptance by a *feme covert* is not rendered obligatory by her being a free trader at the time the bill was drawn and accepted.

March 16, 1891. Argued at the last term.

Married women. Contracts. Before Judge ATKINSON. Glynn superior court. May term, 1890.

The question in this case is as to whether the court below erred in the following charge: "If you should find from the evidence that the defendant, R. Meyers, who is sued as acceptor, was a married woman, that her acceptance was for accommodation only, and at the time he discounted this paper the plaintiff, J. M. Madden, knew of these facts, then, as to the acceptor, the verdict should be for the defendant; and this, whether it be made to appear that she was a free trader or not. The contract of an acceptor for accommodation is one of suretyship, and a married woman cannot make a valid contract of suretyship in this State, whether she be a free trader or not." It appeared from the evidence that the plaintiff knew this lady was an accommodation

acceptor, and a married woman, before he took the draft.

COURTLAND SYMMES, by J. H. LUMPKIN, for plaintiff.  
GOODYEAR & KAY, by brief, for defendants.

BLECKLEY, Chief Justice.

An accommodation acceptor is a surety for the drawer. Such was the character of the acceptance in this case. The code, §1783, declares that "While the wife may contract, she cannot bind her separate estate by any contract of suretyship nor by any assumption of the debts of her husband." We think this section applies to all married women, and that it qualifies the general language of §1760 which says: "The wife by consent of her husband, evidenced by a notice in a public gazette for one month, may become a public or free trader, in which event she is liable as a *feme sole* for all her contracts, and may enforce the same in her own name." The phrase "all her contracts" is qualified by §1783, and this construction reconciles the two sections and renders them consistent. A public or free trader, according to the scheme of the code prior to the act of 1866, was bound by all contracts connected with her trade or business, and was upon substantially the same footing as a minor who, by permission of his parent or guardian or by permission of law, practices any profession or trade or engages in any business as an adult. Code, §2733. We can discover no good reason why married women who are free traders should have any wider discretion as to becoming sureties for other persons, or as to assuming the debts of their husbands, than married women generally. Both sections of the code can have effect together, and construing them as we do harmonizes them with the general spirit of our law touching the rights and powers of married women. All of them are, since the act of 1866, substantially

free traders. The control of their husbands over their contracting privileges is merely nominal if not quite done away with. With or without a separate estate, they can make contracts at pleasure, except as restrained by §1783. *Hays v. Jordan*, 85 Ga. 741, 11 S. E. Rep. 833. This restraint seems wise and salutary. It ought to, and we think does apply alike to all.

The court committed no error. *Judgment affirmed.*

GODBEE v. McCATHERN.

Practice in Supreme Court.

BLECKLEY, C. J.—This case is controlled by *Owensby v. Thompson*, 69 Ga. 773, the certificate of the judge to the bill of exceptions being, according to that case, fatally defective.

March 16, 1891.

*Writ of error dismissed.*

LOVETT & DAVIS, for plaintiff.

No appearance for defendant.

MATTHEWS v. THE STATE.

1. The burglary being fully established, and the whole contest being as to the identity of the burglar, the positive testimony of one witness that she recognized the accused as the person, and the less confident testimony of another that she also recognized him, both of them being on the premises when the offence was committed, and the moon giving considerable light, warranted a verdict of guilty.
2. The newly discovered evidence is not such as to justify the grant of a new trial upon legal principles.

March 16, 1891. LUMPKIN, J., disqualified and not presiding.

Criminal law. Burglary. Evidence. New trial. Before Judge LUMPKIN. Madison superior court. March term, 1890.

Joe Matthews was indicted for burglary. The testimony for the State tended to show that the store of one Phillips was broken open on March 6th, 1887, about ten or eleven o'clock at night. So far as was known noth-

ing was stolen. Phillips heard a noise at the store, and went out and saw a black man about the size of defendant; could not say who it was. The man ran and Phillips after him about a quarter of a mile. When the man came out of the store he shot at Phillips, and Phillips dodged around the corner of the house, and the man jumped out so quick Phillips could not get a clear view of him. Just as he shot at Phillips, Phillips shot at him. It was a moonlight night, tolerably light. Elbert Fleming, a negro man, lived in Phillips' yard at that time, and Phillips, after running the burglar in two or three hundred yards of defendant's house, came back, put on his clothes, took his dog and tracked the burglar, and Fleming came up and Phillips charged him with being the one who had been in the store. Phillips measured the track of the burglar and it was too small for the track of Fleming. The next morning Phillips was still tracking, and defendant came down there and Phillips measured his track, which just exactly fit the track of the man who broke into the store. Mrs. Phillips saw the burglar as he ran, and was positive that it was defendant. The wife of Fleming testified that she did not see defendant come out of the store; that she was where she could see him come out of the store, and he passed right along by her right before Mrs. Phillips; that she (witness) did not know it was defendant "come out of the store"; that he was not to say running fast, but just trotting along, and she did not know he was the one who came out of that store; that she knew defendant well and he was the only one she saw running; that she thought the one that came out of the store was just gone on and that defendant was trying to help catch him, for Mr. Phillips was right close behind him.

The evidence for the defendant tended to show that on the night in question he was sick at home, about a



mile and a half from the store, afflicted with boils and able to get about with difficulty, and that he did not leave home that night. His statement was to the same effect; he denied having committed the burglary, and said he would not injure Phillips that much, because he could get anything from him he wanted that was reasonable, and he would not injure Phillips that way for anything. He was found guilty, and moved for a new trial on the grounds that the verdict was contrary to law and evidence, and because of newly discovered testimony tending to show the following: On the night the store was broken open, Bob Hayes, *alias* Young Robinson, was living at the house of Prince Pendleton, about a quarter of a mile from and in sight of the store. Prince went to sleep very early. Some time in the night Bob Hayes came into the room where Prince was sleeping, and waked Prince by asking him if he heard that fuss up at the store, and Prince said, "No." Bob said they had a terrible fuss up there and had been shooting; and Bob then fell upon another bed in the room. He had on clothes and remained there and did not come out at all, although Phillips sent a hand by there to one Patten's for help, and Prince got up and came out to see what was going on. Bob Hayes in form, size and bearing is very much like defendant, and either might be easily taken for the other. Soon after that time Bob left that section and has never returned. An iron piece, which Phillips stated he thought had been used in breaking the store, was one which had been taken off the wheelbarrow of Patten, and Bob Hayes at that time was living on Patten's land with Prince Pendleton. Bob and defendant wear about the same size shoe. In November, 1887, Bob was sentenced for burglary in Clarke county, under the name of Young Robinson, he having gone by the name of Bob Hayes while he lived at Prince Pendleton's. Bob bore a bad reputation for house-

breaking. Before the burglary in question, Young lived in Oconee county near a man whose smoke-house was broken open, from which a good deal of meat was said to have been stolen, and a warrant was taken out charging Young with that burglary, and thereupon he left that section. The affiant to the last mentioned facts did not know where Young had gone until affiant came to live in Madison county and found him living at Pendleton's under the name of Bob Hayes. Defendant and his counsel made affidavit as to diligence in looking up testimony and preparing the case for trial, and that the facts above stated did not come to their knowledge until after the trial.

The motion was overruled, and defendant excepted.

D. W. MEADOW, by brief, for plaintiff in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN, *contra*.

BLECKLEY, Chief Justice.

1. All the facts requisite to constitute the offence of burglary were established beyond the possibility of question, and the whole contest was as to the identity of the burglar. We cannot escape a feeling of apprehension that some mistake may have been made as to whether Matthews was really the person who committed the crime; but there was moonlight, and Mrs. Phillips testified positively to his identity. Her evidence was strengthened somewhat by that of a negro woman who was present and who, as well as Mrs. Phillips, recognized Matthews at the time. A strange fact is that this woman seems not to have told Phillips who the person was until next day; and a still stranger fact is that, so far as appears, Mrs. Phillips did not tell him at all. Neither she nor Phillips mentions, in the testimony as it comes to us, anything of her having told him; and after having full opportunity at night to converse

with his wife, he resumed the search for tracks next morning, as he says, "to see if I could make any discovery as to who it was." If his wife knew who it was, it is strange that he remained ignorant so long. But the jury heard the witnesses; and deciding according to legal rules, we cannot say that the evidence before them was not sufficient to warrant the verdict. There seems to have been no thorough sifting of the State's witnesses, but the jury were satisfied with the evidence without it; and we cannot order a new trial merely because the witnesses were not sifted on cross-examination. This was the fault of the prisoner or his counsel. Mrs. Phillips may or may not have been mistaken; the jury have found that she was not; the trial judge was satisfied with the finding, and the evidence being sufficient, this court will acquiesce.

2. The newly discovered evidence is not such as to justify the grant of a new trial upon legal principles.

*Judgment affirmed.*

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MYERS v. PIERCE, survivor.

1. Due administration of devised realty by the executrix under an order of the court of ordinary, to pay debts of the estate, cuts off a mortgage made by one of the devisees upon his undivided interest in such realty.
2. The purchaser at foreclosure sale of the undivided interest of a tenant in common in certain lands, takes an undivided interest in every part of the premises. He does not become sole owner of any definite subdivision of the tract.
3. A *bona fide* mortgagee having a valid lien upon two parcels of land, cannot, at the instance of a third person, be enjoined from enforcing the mortgage to await an election by the mortgagor as to which parcel she will relinquish to such third person, either parcel being sufficient to discharge the mortgage debt. If the case is one for election, the mortgagee is entitled to exercise that privilege by exposing either to sale under his judgment of foreclosure. He will have no right to sell both if one should prove sufficient.

March 16, 1891.

Administration. Estates. Mortgages. Sales. Liens. Injunction. Before Judge McWHORTER. Hancock county. At chambers, January 31, 1891.

Reported in the decision.

R. H. LEWIS, for plaintiff in error.

No appearance *contra*.

BLECKLEY, Chief Justice.

The mortgage by E. B. Brown to Pierce & Little was executed in December, 1877, and was made in renewal of a prior mortgage to other parties, dated in March, 1875, which had been assigned to them. The renewal mortgage was foreclosed in October, 1887, and the sheriff's sale made under the foreclosure was in June, 1889. At that sale Pierce, surviving partner of Pierce & Little, the mortgagees, was the purchaser. This is the title which he seeks to assert in the present proceeding. The property embraced in the mortgage and covered by the foreclosure and sale, and by the sheriff's deed to Pierce, was described thus:

"All the undivided interest which he, the said Edward B. Brown, has in the lands of the estate of his deceased father, Alfred E. W. Brown, lying and being in the county of Hancock, State aforesaid, and on which the said A. E. W. Brown resided at the time of his death; the said interest of the said Edward B. Brown being one ninth part, and the said body of land belonging to said estate containing about twenty-seven hundred acres, including the dower lands of Mrs. V. L. Brown, the widow of said deceased, said interest hereby mortgaged being all the interest in or claim held by said Edward B. Brown against the lands of said estate."

These lands constituted a part of the estate of E. B. Brown's father, and as to 20 acres called the "dower lands," were devised specifically in remainder to the testator's children, and the rest of said lands were devised to them in fee by a residuary clause in the will. The adverse claim against which this title is sought to

be asserted. arose thus: The children of the testator, including E. B. Brown, obtained a decree against the executrix for over \$10,000, to be paid to them equally out of the testator's estate. This decree was rendered in October, 1875, some two years prior to the execution of the mortgage by E. B. Brown to Pierce & Little. The executrix, under an order of the court of ordinary, granted at August term, 1874, sold certain lands of her testator in December, 1885, and the same were purchased at such sale jointly by all the plaintiffs in the decree above referred to, except E. B. Brown and one other. The executrix executed a conveyance to these purchasers, one of whom was Laura V. Brown, one of the plaintiffs in the decree and a sister of E. B. Brown. Subsequently, in February, 1887, the purchasers divided the land amongst them, Laura V. receiving two shares, these shares being represented by subdivisions of the tract and numbered as lots 3 and 7. She was entitled to one of the shares by reason of her original interest in the decree, and to the other by purchase through her husband of E. B. Brown's interest in that decree. This purchase took place in September, 1885, more than two months before the sale of the land by the executrix, and was evidenced by an assignment in writing from E. B. Brown to George R. Brown, and from George R. to his wife Laura V. These assignments were for value, but the assignees took with actual notice of the mortgage by E. B. Brown to Pierce & Little upon the land. In March, 1887, Laura V. Brown mortgaged to Myers the above named lots, 3 and 7, to secure a debt of more than one thousand dollars which she owed to Myers. This mortgage was foreclosed, and said lots were about to be brought to sale under the judgment of foreclosure, when Pierce, survivor of Pierce & Little, filed his petition in the nature of a bill in equity, praying that the sale be enjoined, and that Laura V. be restrained from

selling or further encumbering either of the lots. The judge granted an interlocutory injunction, as prayed for, and Myers excepted. Either of the lots is worth more than the amount of the mortgage debt which is sought to be collected by Myers. Besides the prayer for injunction, the bill prayed that Laura V. may be required to elect and choose which of the lots she will take and receive as her share of the land, and that Pierce may recover the other lot as the share or interest of E. B. Brown in the lands of his father's estate, with rents and profits therefor, and that the mortgage *fi. fa.* of Myers may be allowed to proceed only against the lot decreed to belong to Laura V. Process was prayed against E. B., Laura V. and Myers.

1. For three reasons the judge erred in granting the injunction complained of as to Myers. The administration of the land by the executrix under an order of the court of ordinary, granted before any of the mortgages came into existence, cut off the title of the devisees and defeated the mortgage given by E. B. Brown, one of these devisees, upon his undivided interest. The executrix administered the land as the property of her testator. The purchasers at her sale succeeded to his title, not to that of the devisees. *McDaniel v. Edwards*, 56 Ga. 444.

2. The mortgage to Pierce & Little was no lien upon the decree. The decree belonged in part to E. B. Brown as a creditor of his father's estate. His interest in the land before it was administered was as a devisee under his father's will. These two pieces of property were altogether separate and distinct. The decree was negotiable by assignment (Code, §§2776, 4217), and he did assign his interest in it before the land was administered. This interest became the property of his sister, Laura V., by purchase. And whether the land was paid for, at the sale made by the executrix, with the decree

or with money, makes no difference. In either case it became the property of the purchasers. E. B. Brown having before that time parted with his interest in the decree, had no interest in the purchase of the land. But even if the land had not been administered by the executrix, Pierce would have had no interest in the particular lots 3 and 7 now in controversy, except what he acquired by his purchase at the sheriff's sale under his mortgage foreclosure. He would not have been the owner of either of these lots, but merely of one ninth, or at most one eighth, of each of them. To this interest he would have had a legal title, and could have asserted it by claim at law against the mortgage execution of Myers, and would have had no need for an injunction restraining him from selling. He took no measures before foreclosing his mortgage, to concentrate it upon these two lots, but foreclosed it as a lien upon an undivided interest in the whole tract, and therefore his purchase at the foreclosure sale invested him with no exclusive title to any particular part of the tract, but with an undivided interest, if any at all, in the whole. In this case he comes to assert his rights as owner, not as mortgagee. He stands upon his title as a purchaser at the mortgage sale. Consequently he has only such rights as any other person would have who might have purchased at that sale the same property or interest which he purchased.

3. But suppose one of the two lots embraced in the mortgage to Myers does in equity belong to Pierce, the legal title to them both is in Laura V. Brown, and was at the time she mortgaged them to Myers as security for her debt. There is no suggestion that Myers had any notice of Pierce's equity, and it is admitted that one of the lots belongs to his mortgagor. Why then should he be restrained from selling one of them at least? And it is alleged that either of them is of suffi-

cient value to pay off his mortgage. Why then should he not go on and sell one of them and obtain satisfaction? Why delay him until his debtor elects which of the lots she will take? Why not allow Myers to elect which one he will sell? He has a legal lien upon both, and surely if an election is to be made, he is the proper party to make it, and doubtless he will make it by offering one of the lots first, when they are brought to sale under his mortgage. If one should prove sufficient to discharge his demand, he will have no right to sell the other, and there can be no presumption that he would attempt to sell it needlessly.

Any one of the three errors which we have assigned would be decisive against putting Myers under any injunction. Let him proceed to obtain satisfaction of his mortgage debt according to law. *Judgment reversed.*

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GREER v. HOLDRIDGE.

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1127	94

After a judge has once signed the certificate to a bill of exceptions, his power and jurisdiction over the case cease, and there is no law permitting this court to receive and act on a second certificate by the same judge, although it will relieve counsel for the plaintiff in error of any charge of laches in failing to have the bill of exceptions served and filed in time.

March 16, 1891. Argued at the last term.

Practice in Supreme Court.

Reported in the decision.

MARTIN & SMITH and M. T. HODGE, for plaintiff in error.

W. L. GRICE, by brief, *contra*.

SIMMONS, Justice.

The bill of exceptions in this case was certified by the trial judge on the 14th of April, 1890; it was served upon the opposite party on April 28th, 1890, and filed in the clerk's office May 3d, 1890. When the case was



called here, a motion to dismiss it was made upon the ground that the bill of exceptions was not served upon opposite counsel within ten days after the certificate was signed by the judge, or filed with the clerk within fifteen days thereafter, as the law requires. In reply to this, counsel for the plaintiff in error read an additional certificate of the judge who tried the case, dated April 30, 1890, wherein he certifies that it was his fault in not returning the bill of exceptions to counsel for plaintiff in error within the proper time after he had signed it; that through the neglect of his office boy, the bill of exceptions was not mailed, and it was not the fault of counsel for plaintiff in error that service was not perfected in time.

We have held up this case to the present time in order to consider whether we could receive and act on this certificate or not. After a careful consideration of the matter, we have come to the conclusion that the statute does not authorize the trial judge to sign but one certificate, and that certificate is the one provided for by law. After he has once signed and certified a bill of exceptions, his power and jurisdiction over the case cease, and we know of no law which would permit us to receive and act on a second certificate, although that certificate relieves counsel for the plaintiff in error from any charge of laches or negligence in failing to have the bill of exceptions served and filed in time.

We therefore dismiss this writ of error.

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BRIMBERRY v. MANSFIELD.

A landlord has no lien for supplies which his tenant purchased from a merchant and for which he stood the tenant's security; nor will the fact that he paid the note given for the supplies, after it became due, entitle him to such lien. If he ordered the supplies upon his own credit and in that manner furnished them to his tenant, he would be entitled to a lien therefor.

March 16, 1891. Argued at the last term.

86	792
99	140
86	792
101	519
86	792
119	345

Landlord and tenant. Liens. Before Judge BOWER.  
Mitchell superior court. March term, 1890.

Motion to distribute money raised by levy and sale of crops raised in 1888 on land rented for that year of Mansfield, who claimed the fund under his execution from the foreclosure of his landlord's lien for supplies to the amount of \$40, furnished by him to the tenant who cultivated the land. The other claimant was Brimberry, who had a mortgage execution against all the crops of the tenant for that year, for an amount sufficient to cover the entire fund. At the time the tenant rented the land, he told Mansfield that he would have to have some supplies, and that Mansfield would have to furnish them to him. Mansfield told him that he would go on a note with him as security to get some supplies, if he would pay for them like rent for the place; and this the tenant agreed to do. Mansfield sent word by one Faircloth to a merchant to let the tenant have \$30 worth of supplies, and that he (Mansfield) would sign the note for the amount payable in the fall. The account was made out against the tenant, who traded to the amount of \$40 instead of \$30, and some time afterwards the note was signed by the tenant, Mansfield and Faircloth, all as principals; the reason why Faircloth signed being to cover the \$10 above what Mansfield had agreed to become responsible for. When the note fell due, Mansfield paid it; and the amount is still owing. But for Mansfield's order, the tenant could not have got the goods, which were supplies furnished him for himself and his family to enable him to make his crop; they were furnished on the order of Mansfield and not on the credit of the tenant. The tenant told Brimberry, at the time he gave him his mortgage, that he owed Mansfield for rent, and that Mansfield had gone on a note with him payable to the merchant above referred to, for \$40, for supplies. Brimberry asked him if

he had given a lien, and he told him he had not, but that Mansfield had stood his security on note for some goods. Brimberry knew he was the tenant of Mansfield.

Brimberry was the movant in the justice's court, and the fund was there awarded to him. On *certiorari*, the superior court reversed this judgment and ordered that the fund, to the extent of the principal, interest and cost, be paid to Mansfield on his landlord's lien. Brimberry assigned error upon this ruling.

SPENCE & TWITTY; by brief, for plaintiff.

I. A. BUSH, by brief, for defendant.

SIMMONS, Justice.

Under the facts of this case as they appear from the record, we think the court erred in sustaining the *certiorari* and in awarding the money to Mansfield. We think the facts clearly show that Mansfield did not himself furnish the supplies to his tenant, but that he was merely a surety on the note which he and his tenant and Faircloth gave for the supplies. Mansfield was not alone bound for the goods sold by the merchant to his tenant, but the facts show that the tenant and Faircloth were equally bound with him.

In the case of *Scott v. Pound*, 61 Ga. 579, it was held that "In order for a landlord to have a lien upon his tenant's crop for supplies, etc., the landlord must furnish the articles, and not merely become the tenant's surety for the price to some other person by whom they are sold to the tenant." Mansfield being only a surety for his tenant, under the law he would have no lien as landlord for supplies which his tenant purchased from a merchant, and for which he stood the tenant's security; nor would the fact that he paid the note after it became due entitle him to such lien. Of course, had he ordered the supplies from the merchant upon his own

credit, and had in that manner furnished them to his tenant, under the law he ~~would have~~ been entitled to a lien. But as the tenant himself purchased the supplies, and the landlord merely stood his security for the payment therefor, he is not entitled to a lien.

*Judgment reversed.*

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SAVANNAH, FLA. & WESTERN RAILWAY Co. v. WATSON.

It was error to refuse to allow defendant to amend its plea of the general issue by filing a plea of the statute of limitations, though the jury had been charged with the case and had retired to their room, and though plaintiff's counsel stated he would be surprised by the amendment, that his client had been sent home before he knew of the offer to amend the plea, and that were his client present he could testify to such facts as, in his opinion, would take the case out of the bar of the statute.

March 16, 1891. Argued at the last term.

Practice. Amendment. Pleading. Continuance.  
Before Judge BOWER. Decatur superior court. May term, 1890.

Reported in the decision.

D. A. RUSSELL, for plaintiff in error.

DONALSON & HAWES, by J. H. LUMPKIN, *contra*.

SIMMONS, Justice.

The jury had been charged with this case, and had retired to their room. After they had been out all night, the defendant proposed to amend his plea of the general issue by filing a plea of the statute of limitations. Plaintiff's counsel stated that he would be surprised by the amended plea; that his client had been sent home by him before he knew of the offer to amend the plea; that were his client present, he could testify to such facts as, in his opinion, would take the case out of the bar of the statute. The court refused to allow the plea to be filed, and this was the main ground of exception argued before us.

Section 3479 of the code provides as follows: "All parties, whether plaintiffs or defendants, in the superior or other courts (except the Supreme Court), whether at law or in equity, may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by." Under this section, we think the court erred in refusing to allow the amendment, even at the late stage of the case then on trial. This is a very broad provision in the law for amendments. It declares that either of the parties may, *at any stage of the case*, as matter of right, amend their pleadings in all respects, etc. While the facts of this case show gross negligence on the part of the defendant in not sooner offering this amendment, yet, under this section, he had a right to make it at any time before the jury returned their verdict. Of course, had it worked a surprise upon the plaintiff, he would have had a right to continue the cause at the expense of the defendant, and the court should, before allowing the amendment, have put the defendant upon terms, as is provided for in section 3482 of the code.

While we think this is the proper construction of this section of the code, we also think the section goes too far in allowing amendments. We think the right to amend ought, at least, to cease after the jury have been charged with the case and have retired to their room. It frequently works a great hardship upon the courts, at great expense to the county. I have known several instances where cases have occupied the court for days, and at the last stage of the trial one of the parties would offer an amendment which would cause the case to be continued. Besides, it is an inducement to laziness and negligence on the part of counsel.

*Judgment reversed.*

## HOOKS v. HAYS, administrator, for use.

1. The evidence being conflicting and the court below being satisfied with the verdict, there was no error in overruling the motion for new trial as to the grounds that the verdict was contrary to law and evidence.
2. Where amendments were allowed without objection at the time, or exception *pendente lite*, it was too late to complain of their allowance in a motion for new trial two years thereafter.
3. The suit being originally by Ford, to foreclose a mortgage against Hooks, the note and mortgage being payable to the order of Haily, and an amendment having been allowed making Hays, the administrator of Haily, party plaintiff suing for the use of Ford, and the suit after the amendment proceeding in the name of Hays as such administrator, that there was no written transfer of the mortgage from Haily to Ford was not ground for refusing to admit the mortgage in evidence.
4. It was not error to allow a witness not a party and apparently disinterested to testify that Haily told him that he (Haily) had sold the mortgage to Ford, the contract between Haily and Ford being treated by both parties and the court as an issue on the trial.
5. After the amendment making Hays a party plaintiff, testimony by Ford that he was a *bona fide* holder of the note and mortgage before the institution of the suit, was immaterial and did not damage the defendant; his defence was not prejudiced, whether Ford owned the mortgage or it was part of the assets of Haily, as Ford did not claim to have purchased the note and mortgage before they fell due.
6. For reasons above given, there was no error in refusing a new trial upon the ground that the court allowed Ford to testify that he told Hooks how he held the note and mortgage, etc., the objection being that the transfer of the mortgage should be in writing.

March 16, 1891. Argued at the last term.

Foreclosure of mortgage. Amendment. Practice. Evidence. Before Judge BOWER. Worth superior court. April term, 1890.

Reported in the decision.

J. W. WALTERS, for plaintiff in error.

D. H. POPE, *contra*.

SIMMONS, Justice.

Iverson L. Ford commenced his suit to foreclose a mortgage against J. T. Hooks, in October, 1883. The

note and mortgage were payable to the order of E. F. Haily, and Ford alleged that he purchased the same from Haily before the latter's death. At a subsequent term of the court, two amendments were allowed to the petition for foreclosure, one adding a prayer for a judgment of ten per cent. counsel fees, and the other making the administrator of Haily a party plaintiff suing for the use of I. L. Ford. No objections were made to these amendments at the time they were allowed by the court. Two years after these amendments were made, the case was tried, and the plea relied on by the defendant was payment. The jury returned a verdict in favor of the plaintiff, and the defendant made a motion for a new trial upon the several grounds contained therein, which was overruled by the court.

1. The 1st and 2d grounds of the motion were the usual ones, that the verdict is contrary to law and the evidence. The evidence was conflicting as to whether the note and mortgage had been paid by the defendant; and the jury finding that they had not been paid, and the court being satisfied with their verdict, there was no error in refusing a new trial upon these grounds.

2. The 3d and 8th grounds complain of the allowance of the two amendments to the petition for foreclosure, the amendment asking for counsel fees, and the amendment making Hays a party plaintiff suing for the use of Ford. These two grounds of the motion cannot be considered, because the record shows that these amendments were allowed at the April term, 1888, and no objection thereto was at that time made, or exception *pendente lite* filed. It was, therefore, too late to complain of their allowance by the court in the motion for a new trial, two years thereafter.

3. The 4th ground of the motion complains that the court erred in allowing the mortgage from Hooks to Haily to be introduced in evidence, on the ground that there was no written transfer of said mortgage from

Haily to Ford. After the amendment making Hays, the administrator of Haily, a party, was allowed, this was not a good ground of objection. The suit, after this amendment, proceeded in the name of Hays as such administrator, and the mortgage was therefore admissible in evidence.

4. The 5th ground complains that the court erred in allowing plaintiff's witness, Bob Ford, to testify that Haily told him that he (Haily) had sold the mortgage to I. L. Ford. Objection was made to this testimony on the ground that it was hearsay. We can see no objection to the admission of this testimony. Bob Ford was not a party plaintiff, appears to have been a disinterested witness, and was testifying to a contract he heard made between Haily and I. L. Ford. That contract was treated by both parties and the court as an issue on the trial, and we are at a loss to understand why Bob Ford could not testify thereto.

5. The 6th ground alleges error in allowing the plaintiff, I. L. Ford, to testify that he was a *bona fide* holder of the note and mortgage before the institution of the suit to foreclose the same. After the amendment making Hays a party plaintiff, this testimony was immaterial and did no damage to the defendant. It was of no concern to him whether I. L. Ford was the owner of the mortgage, or whether it was a part of the assets of the estate of Haily and belonged to Hays as administrator. His defence was not prejudiced whether the one owned it or the other, as Ford did not claim to have purchased the note and mortgage before they fell due.

6. For the reasons given in our comments on the 4th ground, there was no error in refusing a new trial upon the 7th ground of the motion, which complains that the court erred in allowing the plaintiff, Ford, to testify that he told Hooks how he held the note and mortgage, etc., the objection being that the transfer of the mortgage should be in writing. *Judgment affirmed.*



## FARKAS v. POWELL.

When one hires a horse to go a certain distance, he has no right, under his contract, to go beyond such distance without the consent of the bailor; and when he does go beyond, it is at least a technical conversion or violation of his contract and duty, and if the horse be injured while beyond the point to which it was hired to go, he is liable, whether the injury be caused by his own negligence or that of others, or even by accident, unless he be forced to go beyond that point by circumstances which he cannot control. But though the bailee be guilty of a technical conversion by riding the horse beyond the point to which it is hired to go, if the extra distance do not cause or contribute to the injury, and he return the horse within the limits of his original contract, he should not be held liable for an injury to the horse which occurs without his fault after he has returned it.

(a) The question whether the extra ride did or did not cause, or materially contribute to the injury, is for the jury.

March 18, 1891. Argued at the last term.

Hiring. Bailment. Conversion. Before Judge BOWER. Dougherty superior court. April term, 1890.

Reported in the decision.

J. W. WALTERS, for plaintiff.

D. H. POPE, for defendant.

SIMMONS, Justice.

Powell hired from Farkas a horse to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to return by eleven o'clock at night. When he arrived at the Whitehead place, he learned that the person he wished to see was at the Bryant place, three or four miles beyond, and he rode on to that point. He remained at the Bryant place some two hours and a half, and left there for Albany about half past nine in the evening. On his return, and after getting between the Whitehead place and Albany, the horse fell in the road. After considerable trouble, he got the horse on his feet and led him about three miles, and when within about a mile of Albany,

the horse again fell, and he had to obtain the assistance of two colored men living near by, to again get the horse upon his feet. He then took the horse to the lot of one of these men and left him there, and about daylight in the morning, walked on to the town and notified Farkas's stable-man where the horse was and of his condition. The horse died within a day or two thereafter. Farkas brought suit against Powell, alleging, in substance, that he had ridden the horse three miles beyond the place he had hired him to go, and that by negligence or cruelty the horse had been so injured that he died. The evidence for the plaintiff tended to show that on the afternoon when the horse was hired to Powell, it was sound and in good condition, moved off briskly down the street and showed no signs of any disease, but that when returned the next morning, it was lame and could scarcely walk and had a halter burn around one of its feet. The evidence for the defendant tended to show that he rode the horse moderately, never going faster than a trot, that at the Bryant place he hitched it to a post, that there was no halter or rope around its foot while in his possession, and that in returning from the Bryant place he rode the horse in a walk until suddenly fell in the road. An expert in diseases of horses testified that in his opinion the horse was paralyz and that this may have been produced by straining. There was also evidence that, a day or two before hiring, the horse had been used in hauling dirt. Fell also testified that, about a year before, he had hired another horse from Farkas to go to the same place and rode three or four miles farther than he intended to go, and that when informed of it on his return, Farkas said it was all right, and did not charge him for extra time or distance.

On this set of facts the trial judge charged the jury, ~~causing~~ that if Powell exercised ordinary care in

riding the horse and attending to it while in his possession, it did not make any difference whether he rode it beyond the Whitehead place or not; that if Powell was not at fault in riding and in his attention to the horse, he could not be held liable because he went a greater distance than he had hired the horse to go, although it may have been injured by accident or otherwise without his fault in going this extra distance. The jury found for the defendant, and the plaintiff made a motion for a new trial.

We think this charge was error. When Powell hired the horse from Farkas to go five miles to the Whitehead place, he had no right, under his contract, to go beyond that point without the consent of Farkas; and when he did go beyond, it was at least a technical conversion, or a violation of his contract and duty. And if the horse had been injured while beyond the point to which he was hired to go, Powell undoubtedly would have been liable, whether the injury was caused by his own negligence or by the negligence of others, or even by accident; unless he was forced to go beyond that point by circumstances which he could not control. For example, if a bridge had been washed away, or the road was impassable and in consequence had to take a longer road in order to go to the Whitehead place, he would then be liable only for his own negligence. This principle seems to be sustained by the following authorities: Story on Bailments, §413 *et seq.*, and authorities there cited; Schouler on Bailments, §1 and authorities cited. But the nice question in this case is, would Powell, after having been guilty of technical conversion or violation of his duty and having returned within the limits of the original hiring, and the horse then sustained injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the

ant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. The horse might have been well able to travel the five miles and return, but the six or eight miles extra may have fatigued him to such an extent as to have caused him to stumble and fall, and thus produced the injury. If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault. We can see no good reason to hold the hirer liable for an injury to the horse which occurred, without his fault, after he had returned with it within the limits of his original contract, although he had been guilty of a technical conversion by riding it three miles beyond the point to which it was hired to go, the extra distance not causing or contributing to the injury.

We have been unable to find any case the facts of which are like the facts in this. Nearly all the cases which hold the hirer liable when he has deviated from the terms of his contract, are cases in which he was negligent in fact or wilfully and wantonly misconducted himself, or had overdriven the horse or destroyed or ruined the property while beyond the limits or in the course of deviation from the purpose of the hiring. The cases cited in the brief of counsel for the plaintiff in error were all of this character. See *Mayor, etc. of Columbus v. Howard*, 6 Ga. 213; *Gorman v. Campbell*, 14 Ga. 137; *Collins v. Hutchins*, 21 Ga. 270; *Lewis v. McAfee*, 32 Ga. 465; *Malone v. Robinson*, 77 Ga. 719. So likewise were nearly all the cases referred to in Schouler and Story, *supra*. The facts in those cases show that the property was injured or destroyed during the time it was being improperly used, or being used for a different purpose from that for which it was hired.

The question whether this extra ride did or did not cause or materially contribute to the injury, was for

the jury to determine under the evidence and a proper charge by the court; and the court by its charge having eliminated this issue from the case, we think a new trial should be granted. *Judgment reversed.*

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MEADOWS *et al.* v. TAYLOR *et al.*

SIMMONS, J.—Under the facts as they appear in this record, the court did not err in dismissing the *certiorari*. *Judgment affirmed.*

March 16, 1891. Argued at the last term.

*Certiorari.* Practice. Elections. Stock-law. Before Judge ROBERTS. Pulaski superior court. May term, 1890.

The exception is to the dismissal of a *certiorari* on the ground that *certiorari* would not lie to the ministerial act of an ordinary in opening the returns of a stock-law election for a militia district, and proclaiming the result over the objections of the plaintiffs in *certiorari*, made before the returns were opened and the result declared, and in holding that this question would not be affected by the fact that at the time of the election and consolidation of the votes, a bill of exceptions was pending in the Supreme Court to a refusal of the judge of the superior court to sustain a *certiorari* brought by the same plaintiffs to the action of the ordinary in refusing to sustain their *caveat* to the petition for the election, and in ordering the election. The case made by the bill of exceptions last referred to will be found reported in 82 Ga. 738.

MARTIN & SMITH, for plaintiffs.

JORDAN & WATSON, by brief, for defendants.

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MATTHEWS v. THE STATE.

SIMMONS, J.—There was ample evidence in this case to authorize the jury to find the defendant guilty. *Judgment affirmed.*

March 16, 1891. LUMPKIN, J., disqualified and not presiding.

Criminal law. Burglary. Before Judge LUMPKIN. Madison superior court. March term, 1890.

Georgia Matthews was indicted for burglary. The evidence for the State tended to show the following: On August 19, 1888, the dwelling-house of one Eberhart was broken open and some meal and bacon stolen from it. The property was found in the possession of defendant. She was asked how she came by it. She at first denied taking it, and afterwards, in the presence of three men, freely and voluntarily stated that Albert Pass helped her to burst in the door of the house and they got the meat and meal and carried it off in the woods and divided it. No threats or force or violence were offered to make her admit it, but one of the men present told her if she did take the things it would be best for her to own it, and if she did not, not to do it. No testimony was introduced by her. She stated that when the men came up, they asked her where she got that meat and meal, and if she did not break into the house; that she told them "No," and then one of them said, "If you don't own it you had better own it"; that she said she did not break in, Albert Pass broke in; that Albert did break in and got the meat and meal and gave her part of it. She was found guilty, and moved for a new trial on the ground that the verdict was contrary to law, evidence, etc. The motion was overruled, and she excepted.

D. W. MEADOW, by brief, for plaintiff in error.

W. M. HOWARD, solicitor-general, by J. H. LUMPKIN, *contra*.

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WATSON v. GOOLSBY *et al*.

Where suit was brought against Mrs. Goolsby in a county court, by an ordinary action upon an account, and an appeal was taken to the superior court where her husband and minor son were made

parties defendant, and, under an equitable amendment to the declaration, a verdict and judgment or decree were had for a sum of money and that the amount of the verdict should be a special lien on crops grown on certain lands from year to year until paid, and plaintiff in the judgment applied for an injunction and for a receiver to take charge of the lands and collect out of their proceeds the judgment, and the judge refused the application upon the ground that the minor son had an interest in the property which the judgment or decree would bind had he been properly served, and that he had not been properly served: *Held*, that the judge erred in so holding, the mother, Mrs. Goolsby, being the only person having a direct interest in the land, she having a life estate therein (created by deed) during the life of her husband, with a charge thereon for his support and maintenance during his life, and after his death the minor son and such other children of Mrs. Goolsby and her husband as might be living at the death of the husband, taking the fee. But it being at least doubtful whether the superior court on appeal had the right to allow the amendments making parties and seeking equitable relief (the entire nature of the case being changed by the equitable amendment), and whether the land could not be sold under judgment against Mrs. Goolsby, the life-tenant, subject to the charge thereon for the support of her husband, the judge was not bound to appoint the receiver, it being improper to make such appointment if the superior court had no such jurisdiction, or if the land could be so levied on and sold.

March 16, 1891.

Injunction and receiver. Judgments. Estates. Parties. Appeals. County courts. Jurisdiction. Amendments. Before Judge JENKINS. Jasper county. At chambers, January 20, 1891.

The judge put his refusal of injunction and receiver (which is the judgment excepted to) upon the ground that John K. Goolsby jr., the minor child of John K. Goolsby and Julia E. Goolsby, has such an interest in the income of the land conveyed by the deed below set forth, as made him a necessary party to an action which resulted in a verdict and judgment taken by consent of the parties, in which it was ordered that the judgment be a special lien on the crops growing and to be grown on the land conveyed by the deed, and be enforced as against such crops in three yearly instalments, the

*gravamen* of the present complaint being the failure of the defendants to comply with this judgment; and that the same is void as to the minor, for the reason that the only service upon him was by acknowledgment through the attorney of his guardian *ad litem*. The deed is as follows:

“Georgia, Jasper county.—This indenture made and agreed on this March 30th, 1877, between Cardin Goolsby of said State and county, of the one part, and Julia E. Goolsby of the same county, of the second part, and the children of the said Cardin, except the said John K., of the third part, witnesseth that, subject to the conditions, limitations, to be herein mentioned and contained, for the purpose of securing a home and a support for the said John K. and his family, and in consideration of the natural love and affection the said Cardin Goolsby has for his son John K. and his wife, the said Julia E., and also in consideration of the love and affection he has for his other children, and also in consideration of the sum of five dollars to him in hand paid, he the said Cardin Goolsby has granted, given and conveyed, and by these presents doth give, grant and convey unto the said Julia E. for and during the life of the said John K. or so long as he shall live, with remainder over in fee to such child or children as the said John K. may beget by his present or any future wife, the following lands. . . . But if at the death of the said John K. he the said John K. shall not have begotten children by his present or any future wife, in remainder over in fee to the children of the said Cardin; that is to say, the true intent and meaning of this writing is and shall be so construed, the said Julia E. shall take an estate in the premises herein treated of, for and during the life of John K. Goolsby; an estate in remainder in fee shall revert immediately in the children of the said Cardin Goolsby, subject to be divested from the said Cardin's children upon the said John K. begetting children by his present or any future wife, in which event the children of the said John K. shall take an estate in remainder in fee. Provided always, and to this end all estate for years, life or in remainder are subordinate and dependent, the said John K. so long



as he lives shall be supported from the rents and profits issuing out of said land; that is to say, his support and maintenance during life shall be a charge upon said estate, but not to the extent of diminishing the *corpus*, and he takes no other interest in this deed, nor shall the rents or profits issuing out of said lands be liable to any debt or contract of his. . . . ”

The action was originally against Julia E. Goolsby. By amendment John K. Goolsby and John K. Goolsby jr. were made parties defendant. On this amendment it was ordered that John K. Goolsby be appointed guardian *ad litem* for John K. Goolsby jr., and be served with a copy of the amendment. Following this order is an acknowledgment of service and waiver of process “for all the debts,” signed by “F. Jordan, atty. for J. K. Goolsby and J. K. Goolsby guardian *ad litem* for John K. Goolsby, minor.”

JOHN C. KEY and HALL & HAMMOND, for plaintiff.

JORDAN & LANE, by brief, for defendants.

SIMMONS, Justice.

The trial judge placed his refusal of an injunction and the appointment of a receiver in this case upon the ground that the minor son was interested in the land and the fund; that he had not been properly served in the common law suit, and therefore the judgment or decree sought to be enforced in this equitable petition did not bind him. We think the trial judge was wrong in holding that the infant had an interest which the judgment or decree would bind had he been properly served. Mrs. Goolsby, the mother, is the only person having a direct interest in the land. She has a life estate therein during the life of her husband, John K. Goolsby, with a charge thereon for the support and maintenance of her husband during his life. After his death, the minor, John K. jr., and such other children as may be living at his death, take the fee.

But while the reasoning of the judge was erroneous, his judgment refusing the injunction may be right, according to the facts disclosed in this record. There are two reasons which might have authorized him to refuse the injunction, if they had been considered. The first is, did the superior court, on an appeal from the county court, have the right and power to allow the amendments making John K. Goolsby and his son parties to the action in the superior court; and did it also have power and authority to allow the amendment seeking equitable relief? Did it have the power and authority to enter up the judgment or decree which it rendered in this case? In other words, can an appeal be taken from a county court, which has no equitable jurisdiction, to the superior court, and the entire nature of the case be changed by an equitable amendment? The second question is, cannot this land be sold under the judgment against Mrs. Goolsby, the life tenant, subject, of course, to the charge thereon for the support of John K. Goolsby during his life? If the superior court had no jurisdiction to allow the amendment and to enter up the decree, or if the land can be levied on and sold under the judgment against the life-tenant, the appointment of a receiver would be improper. These matters being at least doubtful, the judge was not bound to make such appointment. We therefore affirm the judgment.

*Judgment affirmed.*

86	809
87	490

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BENTLEY v. FINCH et al.

Where the suit was upon an unconditional contract in writing, and no plea was filed nor was the name of the counsel marked upon the docket, nor the attention of the court called to the fact that counsel who was absent was employed in the case or expected to appear in the same, it was the duty of the court to award judgment without a jury. This having been done, it was error to set the judgment aside upon a showing that counsel had been em-

ployed by defendant, whose name defendant had requested the clerk of the court to enter upon the docket, that such counsel was a member of the legislature which was in session, and that defendant had a meritorious defence.

March 18, 1891.

Motion to set aside judgment. Practice. Before Judge HANSELL. Brooks superior court. May term, 1890.

Reported in the decision.

D. W. ROUNTREE, for plaintiff.

No appearance for defendants.

SIMMONS, Justice.

We think the court erred, under the facts of this case, in setting aside the judgment. There was no plea filed, the name of counsel was not marked upon the docket, nor was the attention of the court called to the fact that the absent counsel was employed in the case or expected to appear in the same. When counsel is employed in a case—especially in defence of a suit on an unconditional contract in writing,—it is his duty to file his pleas at the first term of the court, and to mark, or have marked, his name upon the docket. When this is not done, it is the duty of the court to award judgment without a jury in the case. This case was doubtless called in its order, and no plea having been filed, and counsel's name not having been marked upon the docket, the court entered judgment thereon. We do not think the defendants in the court below made a sufficient showing to authorize the judge to set aside a solemn judgment made at a former term of the court. The fact that one of the defendants requested the clerk to mark the name of his counsel on the docket is not sufficient; the fact that counsel was a member of the legislature, which was then in session, is not sufficient; the fact that the defendants now say they have a meritorious defence is not sufficient. Defendants had more

than six months within which to inform the court of this defence, and failed to do it in the manner prescribed by law. They, or their counsel, should have seen that such defence was filed. The least they could have done would have been to mark the name of their counsel on the docket, so as to inform the judge that there was a defence to the suit. Not having done this, and showing no sufficient reason for setting the judgment aside, the trial judge erred in granting the motion. *Phillips v. Taber*, 83 Ga. 565, 10 S. E. Rep. 270; *McDaniel v. McLendon*, 85 Ga. 614, 11 S. E. Rep. 869.

*Judgment reversed.*

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SEATS v. THE GEORGIA MIDLAND & GULF RAILROAD CO.

LUMPKIN, J.—Under the plain provisions of our statutes, a widow cannot recover damages from a railroad company for the killing of her husband when it appears that, by ordinary care, he could have avoided the killing, and that his death was caused by his own negligence. Code, §§2972, 3034. *Judgment affirmed.*

March 18, 1891. Argued at the last term.

Negligence. Railroads. Before Judge FORT. Harris superior court. October term, 1889.

Mrs. Seats sued the railroad company for the alleged negligent killing of her husband. The evidence for the plaintiff, briefly stated, tended to show that Seats was killed while walking on the railroad track. He was sixty-two years old, was quite deaf, and his eyesight was somewhat impaired. The public road ran along by the side of the railroad, and he could have conveniently used that road. At the place where he was struck there was room for him to have stepped off the track so as to have avoided the train. He was killed between a blow-post and a crossing. The engine that struck him blew for the blow-post just before reaching it, blew crossing-signal and danger-signal, and

its bell was rung before it struck him. The train was a mixed one, having six or seven freight-boxes, an accommodation-coach and baggage-car. There was ample time for Seats to have stepped off the track after the whistle blew. He could have been seen by a man on the engine for more than three hundred yards. Seats had been warned to keep off the railroad by his son-in-law. The point where he was struck was two hundred and eighty-three yards from the blow-post, and the train ran about two hundred yards after the danger-signal was blown and the bell rung, before it stopped. One witness for the plaintiff testified that there was nothing the matter with Seats except that he was deaf.

The evidence for the defendant tended to show that another person besides Seats' son-in-law had advised him to keep off the track, and he made no reply. Seats was deaf, but could hear an engine in fifty yards of him; could hear one talk if one spoke in a loud voice. His deafness was not known to the engineer and fireman. Just before reaching the blow-post the whistle was blown and the steam shut off, and the train proceeded down the track simply by its own momentum. It was two hundred and eighty-three steps from the blow-post to Seats, and three hundred and forty steps to where the train stopped from Seats, and it was two hundred and forty steps from the road crossing to Seats. The train was on time. Seats' sight was good for a man of his age. The train was running fifteen miles an hour when the engineer saw Seats one hundred and fifty or a hundred and seventy-five yards ahead. Seats was looking at the engine and then looked down. The engineer had his train under control so that he could have stopped before he got to the crossing, if necessary, and thought Seats would get off. Seats was going toward the engine, and when the engineer saw he made no effort to get from the track, he blew brakes on, put on steam-brake, re-

versed his engine and blew the danger-signal, and the fireman rang the bell; but the train could not be stopped until after it had struck him. The engineer could not see him sooner than he did, because the train was on a curve through a cut, and the engine had an extension front. The engine was a good one, and in good order. After Seats saw the engine he could easily have stepped off the track. There was a steam-brake on the engine and hand-brakes on the coaches. This train could not have been stopped after seeing Seats before striking him. Heavy freight trains, running as this one was and down grade, take five or six hundred yards to stop in. It is not customary to use air-brakes on freight trains.

The jury found for the defendant. The plaintiff excepted to the denial of a new trial.

THORNTON & CAMERON, for plaintiff.

GOETCHIUS & CHAPPELL, for defendant.

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HARRISON *et al.* v. PERRY.

1. The main issue in an action of ejectment brought by the heirs of the grantee named in a certain deed, being whether or not this deed was delivered to such grantee, she being dead when the case was tried, the defendant, who, though not by name a party to the deed, was at the time it was signed the owner of a perfect equity in the land covered thereby, and participated in negotiations relating to its being signed by one who held the legal title, and to the disposition made of it after it was signed, was not, under the evidence act of 1866, a competent witness to prove, in his own favor, facts tending to show its non-delivery.
2. The maker of such deed, not being a party to the case, was, under said act, a competent witness to testify against his own interest as to facts connected with the delivery or non-delivery of the deed.

March 16, 1891. Argued at the last term.

Ejectment. Deeds. Evidence. Witness. Before Judge FORT. Harris superior court. October term, 1889.

Reported in the decision.

C. J. THORNTON, for plaintiffs.

L. L. STANFORD and J. H. WORRILL, for defendant.

LUMPKIN, Justice.

It appears from the evidence in this case that one J. J. W. Biggers at one time owned the land in dispute. He bargained said land to J. B. Perry, taking Perry's promissory note in payment for the same and delivering to Perry his bond for titles. Afterwards, Perry paid the full amount of the purchase money. The plaintiffs, who were the heirs at law of Mary L. Harrison, a daughter of J. B. Perry, relied upon a deed signed by Biggers, which purported to convey the land to said Mary L. Harrison. The main dispute in the case was whether or not this deed had ever been delivered. For the plaintiffs it was contended, the proof showed that after Perry had paid for the land, he surrendered the bond for titles to Biggers, and procured Biggers to make the deed called for by said bond directly to his daughter, the said Mary L., or that after said deed was so made and delivered, Perry acquiesced in and ratified what had been done. On the other hand, the contention of the defendant was, that after he had paid the purchase money to Biggers, Perry's wife, who was old and very ill, and who desired that the land should be conveyed to her daughter, the said Mary L., requested Biggers so to do, and that he, accordingly, made out and signed the deed to gratify the old lady, but did not deliver it to the daughter; that on the contrary he delivered it to the defendant Perry, stating, at the time, that he made the deed to Mary to gratify old Mrs. Perry, that it was wrong to so make it, but for him (the defendant) to take it and keep it, and not deliver it to Mary, and at the proper time he, Biggers, would make the defendant Perry a title to the land in conformity to the bond; that with this understanding he, Perry, took the deed from Biggers and surrendered

to the latter his bond for titles; that said deed never was delivered, but was, without the knowledge or consent of the defendant Perry, abstracted from his house and put upon record.

1. On the trial, the defendant Perry was offered as a witness to prove the facts above recited, in his own defence; and the first question presented for our determination is, whether or not, under the evidence act of 1866, which was in force at the time of said trial, he was a competent witness for such purpose. We think he should have been excluded, both under the letter and spirit of that act. In the first place, he was a party to the case and had a direct personal and pecuniary interest in the result of it. The contest was between him and the heirs at law of his deceased daughter, Mary L. Harrison, and the effect of his testimony, if admitted, was to break down and destroy the validity of the paper which purported on its face to be a deed from Biggers conveying the land in dispute to her, under whom these plaintiffs claimed title. Moreover, we think that under the undisputed facts disclosed by this record, Perry should be treated as a party to the deed itself. It is true he was not a party thereto in name, but the facts show he had bought the land from Biggers, had paid the full purchase money therefor, and had surrendered to Biggers his bond for titles. While, therefore, Biggers held the legal title, the actual ownership of the property was in Perry, and if no dispute had arisen as to the validity or delivery of the deed, Perry would stand in the same attitude as if he had taken a deed from Biggers and then himself made a deed of gift to his daughter. The deed from Biggers was signed by him, and duly attested according to law. On its face it purports to have been signed, sealed *and delivered*, and such, therefore, is the legal presumption. It was incumbent on Perry to overcome this presumption, and



this he sought to do by his own testimony; which we do not think should be allowed. If plaintiffs' theory is true, his position in the case is, for all practical purposes, precisely the same as if he, having the legal title, had made out and signed a deed conveying the land to his daughter, and was claiming that such deed had never been delivered to her. Treating him, therefore, not only as an interested party to the case, but also as substantially a party to the contract itself which was in issue and on trial, he could not break down plaintiffs' theory by his own testimony, and is excluded from testifying, under the first exception to the evidence act of 1866, which reads as follows: "Where one of the original parties to the contract or cause of action in issue or on trial is dead, or is shown to the court to be insane, or where an executor or administrator is a party in any suit on a contract of his testator or intestate, the other party shall not be admitted to testify in his own favor." Code, §3854, paragraph 1. And this is true whether the word "party" last used in the exception quoted means party to the case, or party to the contract; because, as we have endeavored to show, Perry was really a party to both.

2. The defendant also offered Biggers as a witness to prove the alleged facts above recited as to the non-delivery of the deed. In our opinion Biggers was a competent witness for this purpose. He was not a party to the case, and had no immediate interest in the result thereof. It was his ultimate interest that the deed in question should be sustained, because it contained a warranty of the title from himself to Mrs. Harrison. If her heirs prevailed in this suit, his warranty would be thus established, and he would be freed from further liability thereon. If they failed to recover, he might become liable to her heirs in an action for a breach of this warranty. It appears from the record that in no event

could he be further liable to Perry. Perry had voluntarily surrendered to Biggers his bond for titles, had accepted from Biggers the deed in dispute; and no matter whether the same was delivered or not delivered to Mrs. Harrison, the conduct of Perry had estopped him from asserting any further demand against Biggers concerning this land. When, therefore, Biggers was offered to prove circumstances which if true would tend to defeat a recovery by the heirs at law of Mrs. Harrison, he was testifying against his own interest; because, if they failed to recover the land, he was at least putting himself in a position where they might make him liable upon the warranty in the deed. In the exception to the evidence act of 1866 above quoted, no witness is prohibited from testifying against his own interest. The law simply says that witnesses coming within such exception shall not be allowed to testify *in their own favor*. It may be said that if an action at law was brought by the heirs of Mrs. Harrison against Biggers upon the warranty in said deed, he would not be permitted as a witness to testify to the identical facts which he was offered to prove in the case now pending; and no doubt this is true, but for the manifest reason that in such an action Biggers would then have a direct interest in the result of that case, and he would be forbidden by the law from testifying to facts which would aid in his defence thereto, because under those circumstances such testimony would be in his own favor. In the present case this reason does not apply; and we think for the reasons already given he was a competent witness to prove the facts recited.

It will be observed that our rulings in this case as to both the witnesses, Perry and Biggers, are based upon the language of the statute in connection with the facts, without reference to previous adjudications of this court upon questions arising under this act. It seems so

clear that our rulings in this case can be safely made in the manner stated, that we deem it unnecessary to review and endeavor to harmonize the various decisions already made upon this act, the more especially as a new act has been passed upon the subject, which we trust will relieve the courts from many of the embarrassments and difficulties experienced under the act of 1866.

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2. Sold, may be, to pay pastor's salary. *Ib.*
3. Private property. *Ib.*; *City v. Church*, 731.
4. Street-paving assessments, subject to. *City v. Church*, 731.

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1. Wife's, verdict sustaining, contrary to law and evidence, when. *Silvey v. Chamblee*, 333.
2. Telegram after levy, from defendant in *fi. fa.* to claimants, not admissible. *Powell v. Brunner*, 531.
3. Bailment of goods for sale, with title retained, shown on trial of prevails over levy. *Ib.*
4. Dismissal of levy for want of evidence of title or possession in defendant. *Freeman v. Sturgis*, 622.  
Improper, general motion to reinstate granted for error on face of record. *Wilson v. Herrington*, 777.

#### CODE SECTIONS.

- 4, par. 1. Statutes authorizing assessments for street-paving construed in light of. *City v. Church*, 735.
- 4, par. 3. Applies to provisions touching wills. *Ellis v. Darden*, 369.  
And to horse with pronoun "his" in indictment. *Brown v. State*, 635.

- 4, par. 6. Advertisement once omitted, election not vitiated, when. *Irvin v. Gregory*, 610.
10. Jury trial waived in misdemeanor case. *Logan v. State*, 268.
- 206(6). Process with clerical error, amendable, when. *R. & D. R. Co. v. Benson*, 205.
- 247(a)-(e), of *addenda*. Not unconstitutional. *Bone v. State*, 115.
337. County commissioners of Bartow county cannot change militia districts. *Crawford v. Glasgow*, 358.
457. Injunction or petition in equity not defendant's remedy if judgment not entered. *Lee v. Arnsdorff*, 265.
- Entry *nunc pro tunc*, query. *Ib.*
- 508(1). Applies where no better means are provided, not where registration is required. *Gavin v. City*, 134.
- 719(q) *et seq.*, amended by act of 1883. Refusal to issue through bills of lading, followed by refusal to deliver cars to connecting carrier, no action for. *Coles v. Central R. Co.* 251.
- 720 *et seq.* Private way declared permanent, not authorized. *Herndon v. Strickland*, 323.
- Removing obstructions, what required for *Ib.*
798. Church property is subject to assessment for street-paving. *City v. Church*, 737.
884. Tax titles protected equally with those depending on sales under judgments. *Boyd v. Wilson*, 385.
891. Governs pointing out property for tax-execution; §3641 not applicable. *Ib.*
- 891(a). Strict compliance with, necessary to bind third persons. *C'arke v. Douglass*, 125; *Wilson v. Herrington*, 777.
898. Year for redemption runs from time of sale, not of record of deed. *Boyd v. Wilson*, 384.
1334. Advertisement omitted once, treated as mere irregularity, when. *Irvin v. Gregory*, 611.
- 1689(t). "Now constructed" and "already constructed" refer to railroads constructed before the statute. *Macon & A. R. Co. v. Macon & D. R. Co.* 83.
- 1720-4. Alimony denied, husband's property in schedule remained his, though no judgment entered. *Burns v. Lewis*, 594.
1753. Indictment may describe house as husband's, though owned by wife. *Yarborough v. State*, 398.
1760. Restriction of power under, by §1783; accommodation acceptance by *feme covert*, not binding. *Madden v. Blain*, 780.
1761. Year's support not set apart for minor from estate of mother leaving husband and father also. *Phelps v. Daniel*, 363.
1764. Antenuptial contract for payment by husband's executors to wife on his death, barred dower. *Huguley v. Lanier*, 640.

1783. Accommodation acceptance by free trader *feme covert*, not binding. *Madden v. Blain*, 780.
1949. Defeasible deed held by mortgagees, did not compel relinquishment of lien on fund in court. *Vance v. Roberts*, 461.
1954. Power of sale in mortgage, revoked by death. *Wilkins v. McGehee*, 767.
- 1955(a). Oxen sold on condition but in parol, subject to judgment against vendee. *Mann v. Thompson*, 348.
1978. Board of tenant included. *Jones v. Eubanks*, 619.
2182. Power of attorney in fact must be in writing, but agent with parol power may interpose illegality. *Cook v. Buchanan*, 762.
2183. Power of sale in mortgage revoked by death. *Wilkins v. McGehee*, 767.
2207. Illegality interposed without written power. *Cook v. Buchanan*, 761.
2250. Estate created by deed or will, immaterial, when. *Baird v. Brookin*, 713.
- 2316, par. 2. Conveyance procured by promise made to deceive. *Brown v. Doane*, 38.
- 2394-2482. Masculine in, includes feminine. *Ellis v. Darden*, 370.  
Revocation of wills of women, and of men. *Ib.*
2484. Minor not entitled to year's support from estate of mother leaving also husband and father. *Pheips v. Daniel*, 366.
2571. Minor not entitled to year's support from estate of mother leaving also husband and father. *Ib.*
2573. Ordinary acts judicially on objection to return of appraisers. *Ib.*
2580. Memorandum of "donations," newly discovered, will not reopen decree finding no advancements, when. *Langford v. Nabers*, 454.
2699. Vendees of remaindermen cannot recover before end of life-estate. *Fleming v. Ray*, 536.
2733. Married women, prior to act of 1866, upon footing of minor here. *Madden v. Blain*, 781.
2757. Written undertaking to pay for land when the vendor produces complete chain of paper title, ambiguous. *Brown v. Doane*, 39.
2776. Interest in decree assigned before administration. *Myers v. Pierce*, 789.
2850. Land trade rescission not prevented by offer of other land of same kind. *Bell v. Hutchings*, 572.
2016. Penalty action not governed by. See §2925 *post*. *W. U. Tel. Co. v. Nunnally*, 503.

2925. Penalty action against telegraph company, barred in one year from when. *Ib.*
2926. Saving in, applicable to minor, though his guardian might have sued. *Monroe v. Simmons*, 346.
2942. Trover suit malicious and unfounded. *Farrar v. Brackett*, 465.
2966. Executors of mortgagor, present at sale under power in mortgage, may contest its validity. *Wilkins v. McGehee*, 771.
2971. Amending act of 1887 allows recovery by mother partly dependent on child killed. *Daniels v. R. Co.* 237.
2972. Crossing track, injury avoidable. *Atla. R. Co. v. Loftin*, 45.  
Walking on track, deaf and aged man was negligent. *Seats v. R. Co.* 811.
2974. Trade, office or profession affected, special damage unnecessary for action. *Hardy v. Williamson*, 557.
2977. "Thief" is actionable; charge is larceny. *Roberts v. Ramsey*, 433.  
Moral turpitude charged in publication, without specific crime, action lies. *Hardy v. Williamson*, 557.
- 2982-95. Burden on plaintiff to show concurrence of malice and want of probable cause. *Joiner v. Ocean S. Co.* 238.  
Probable cause shown, malice immaterial. *Ib.*  
Advice of counsel as bearing on probable cause. *Ib.*  
Warrant regular, properly sued out, and arrest under it proper and legal, no false imprisonment. *Ib.*
3033. Burden might not have been on company but for cars obstructing crossing. *Sav. R. Co. v. Smith*, 230.  
Presumption arises in all cases, and is to be considered. *Central R. Co. v. Hubbard*, 624.
3034. Aged and deaf man walking on track, homicide of, by his negligence. *Seats v. R. Co.* 811.
3066. Conductor of train may testify whether his intention was to expel the passenger. *Ga. R. Co. v. Eskew*, 644.  
Evidence authorized charge. *Ga. R. Co. v. Dougherty*, 743.
- 3071-3. Damages to expelled passenger after reaching his destination, too contingent. *Ga. R. Co. v. Eskew*, 644.
- 3072-3. Selling liquor to slayer while drunk, too remote here for recovery by widow of deceased. *Belding v. Johnson*, 180.
- 3149(a) *et seq.* Not applied to firm who had ceased to be traders, dissolved, and their stock seized by legal process a week before. *Kimbrell v. Walters*, 99.
3194. Conveyance procured by promise made to deceive. *Brown v. Doane*, 38.
3220. Possession of family dwelling in husband, though belonging to wife, not interfered with by interlocutory order after their separation. *Payton*, 773.

3296. Written notice under §3309 has the effect of appearance and replevy on right to general judgment. *Sutton v. Gunn*, 654.
3297. Affidavit must be positive as to grounds. *Moore v. Neill*, 186.  
 Void, petition for, not amendable. *Ib.*  
 Affidavit of debtor himself admitting intent to hinder and delay, authorizes attachment. *Gray v. Neill*, 188.  
 Proceedings under, what proper. *Ib.*
3308. Filing on last day of first term suffices. *Sutton v. Gunn*, 652.
3309. General judgment, plaintiff entitled to, by giving notice. *Ib.*  
 Process need not be attached; service of notice suffices. *Ib.*
3332. Knowledge by railroad servants of plaintiff's exposure to danger not alleged, fatal. *Andrews v. R. Co.* 194.
3334. Second process in same suit without express order, void. *Peck v. LaRoche*, 316.
3335. Demurring generally is pleading to merits. *Lyons v. Bank*, 487.
3339. Service after appearance term not authorized by process alone. *Peck v. LaRoche*, 316.
3345. Clerical error in process, as to term, amendable. *Richmond & D. R. Co. v. Benson*, 206.
3366. Possession of decedent puts defendant, in suit by heirs, on proof of his title. *Wolfe v. Baxter*, 707.
3456. Copy process not annexed to copy petition served, ground not sworn to, not treated as dilatory. *Lyons v. Bank*, 486.
3457. No deprivation of right to strike jury and cross-examine witnesses, by not pleading. *Davis v. Wimberly*, 48.
3459. Motion to dismiss granted where plea established by declaration itself. *W. U. Tel. Co. v. Nunnally*, 503.
3479. *Caveat* amended on appeal by striking grounds. *Phelps v. Daniel*, 365.  
 Process, prayer for, omitted, amendable, and waived by appearance and pleading. *Lyons v. Bank*, 487.  
 Statute of limitations added to general issue after jury retired. *Sav. R. Co. v. Watson*, 796.
3482. Applicable where statute of limitations pleaded after jury retire. *Ib.*
3483. "Columbus" substituted for "Carrollton" in name of defendant corporation, no new party. *Chat. R. Co. v. Jackson*, 680.
3490. Clerical error amendable, when. *R. & D. R. Co. v. Benson*, 204.
3554. Blacksmith, proprietor of shop, not within. *Tatum v. Zachry*, 573.
3615. Illegality affidavit may be made by agent without written power. *Cook v. Buchanan*, 762.
3641. Not applicable to tax-executions, but to executions founded on judgments. *Boyd v. Wilson*, 385.

3842. Levy on growing crop among other things, not rejected entirely. *Johnston v. Patterson*, 727.
3846. Sheriff must maintain his custody and possession. *O'Pry v. Kennedy*, 662.
3848. Levy on goods of insolvent traders was at least a week before application for injunction. *Kimbrell v. Walters*, 101.
- 3856(a). Municipal taxes or assessments, sales for, not necessarily advertised in newspaper advertising sheriff's sales. *Bacon v. Mayor*, 303.
3870. Power of attorney in fact must be in writing executed as per §2182: acts not to be repudiated as if appointed in parol, as per §2207. *Cook v. Buchanan*, 762.
3882. Prisoner convicted, taxable with fees of how many State's witnesses, though residents of county. *Brown v. State*, 376.
3772. Wife's declaration, on hearsay, of husband's death, not admissible, when. *Williams v. State*, 548.
3789. Attorney's settlement with one of three clients to avoid rule, is evidence for the other two. *Howland v. Bartlett*, 669.
3790. Party introducing witness not bound by his testimony, as an admission, circumstances not requiring denial. *McElmurray v. Turner*, 217.
3792. *Corpus delicti* not shown, not supplied by proof of doubtful confession. *Johnson v. State*, 93.
3801. Written undertaking to pay for land when vendor produces complete paper title, ambiguous. *Brown v. Doane*, 39.
3824. Laws of other State construed by aid of testimony of attorneys. *Chat. R. Co. v. Jackson*, 681.
- 3841, 3845. Prisoner convicted, taxable with fees of how many State's witnesses, though residents of county. *Brown v. State*, 375.
- 3854, par. 1. Defendant in ejectment cannot testify to non-delivery of deed, when; maker, not a party, is competent, how. *Harrison v. Perry*, 816.
3869. Applies to the State on criminal trial. *Dixon v. State*, 754.
3972. Sale may take place after ten days' advertisement, under §3648. *Kimbrell v. Walters*, 101.
4059. Handing original papers to opposing counsel will not suffice. *Franke v. May*, 660.
4079. Dismissal of counter-affidavit and execution of warrant, without recovery by verdict, is no breach of bond. *Clark v. Lee*, 29.
- 4085 *et seq.* Manner, means or nature of force used need not be described in affidavit and summons. *McAlpin v. Purse*, 271.
4181. Amendment to equitable action against church, what allowable. *Lyons v. Bank*, 489.



4217. Interest in decree assigned before administration. *Myers v. Pierce*, 789.
4250. General demurrer overruled, writ of error lies, though case still pending below. *City Council v. Lombard*, 165.
4262. Filed less than ten days before return day, returnable to second term after. *Logan v. R. Co.* 494.
4265. *Ib.*
- 4272(d). *Ib.*
4330. "Other instances" than those enumerated, fairly left to jury. *Bone v. State*, 108.
- 4331-3. Killing to prevent illicit intercourse with daughter, not apparent. *Ib.*
- 4394-5. Description insufficient, special demurrer on arraignment sustainable. *Brown v. State*, 634.
4398. Larceny after trust of 15 head of beef cattle worth \$20. per head, sufficient description. *Sanders v. State*, 723.
4406. No conviction of simple larceny under indictment for larceny from house of five-dollar bill. *Allen v. State*, 399.
4409. Stealing metallic money out of doors is only misdemeanor. *Ib.*
4414. Indictment and trial for misdemeanor, verdict for felony, judgment arrested. *Ib.*
- 4422, 4424. Character of trust and object of bailment not stated, indictment bad. *Sanders v. State*, 717.
4429. Prohibits insolvent bank preferences which might be legal by other debtors under act of 1818. *Hill v. Bank*, 284.  
Transfer to others than *bona fide* purchasers without notice, makes trust fund recoverable by receivers. *Ib.*
4527. Pistol carried in basket or bag on arm and not for transportation alone, violates. *Boles v. State*, 255.
- 4540(a). Police regulation, with regard to restraint of minors, not alone to wishes of parents. *Gill v. State*, 752; *Dixon*, 754.
- 4586(a). Passenger need not wait to be forcibly expelled, but may obey peremptory order to leave, and have redress if order wrongful. *Ga. R. Co. v. Eskew*, 644.
4587. Extenuating evidence, what rejected. *Culver v. State*, 197.
4629. Larceny of horse, insufficient description, objection to be made on arraignment. *Brown v. State*, 635.
- 4714-16. Forcible entry and detainer, affidavit and summons in, need not describe manner, means or nature of force used. *McAlpin v. Purse*, 273.
4917. Waiver good under indictment as well as under accusation. *Logan v. State*, 268.
4918. Second process issued in same suit without express order, void. *Peck v. LaRoche*, 314.

- 4964 (of Irwin's). Changed by code of 1873, §5116. *Burns v. Lewis*, 595.
5006. Church property not impliedly exempt from taxation or assessment. *City v. Church*, 739.
- 5116 (of 1873). Revising power extended only to special findings touching rights and disabilities. *Burns v. Lewis*, 595.
- 5135 (of 1873). Divorce severed wife from family as completely as death. *Ib.*
5145. Judgment by judge of city court of Macon without jury, on attachment founded on conditional note, valid, when. *Sutton v. Gunn*, 652.
- 5181, '2, '4. Church property not impliedly exempt from street-paving assessments. *City v. Church*, 739.
5191. Whether two thirds so voted, determined by number of registered voters. *Gavin v. City*, 134.
5204. Municipal public schools must be free to all children of the municipality. *Irvin v. Gregory*, 613.
5207. Advertisement once omitted, treated as mere irregularity, when. *Ib.*

CONFESSIONS. See *Criminal Law*, 5, 15, 36.

CONSIDERATION. See *Contracts*, 12.

CONSTITUTIONAL LAW. See *Statutes*.

1. Telegraph companies, encouragement of, with powers, etc., and penalty for divulging contents of message, in same act, two different subject-matters contemplated. *Western U. Tel. Co. v. Cooledge*, 106.
2. Superior court in two sections in counties with city of 10,000 inhabitants, constitutional. *Bone v. State*, 108.
3. Election to incur municipal debt, registration for, determines whether requisite number vote in affirmative. *Gavin v. City*, 132.
4. Futures, buying and selling of, is gambling, and not protected by interstate commerce clause. *Alexander v. State*, 246.
5. Street-improvement assessments, constitutionality of, decided. *Bacon v. Mayor*, 301.
6. Divorce, functions of court and jury under constitutions of 1865 and 1868. *Burns v. Lewis*, 595.
7. Election for establishing municipal public schools, advertisement once omitted, treated as mere irregularity, when. *Irvin v. Gregory*, 605.
8. Schools, statute authorizing, in town, not construed to allow non-resident pupils to exclude any resident, or to be admitted at rate less than tax paid for each resident. *Ib.*

Incidental fee chargeable to non-residents, not to residents. *Ib.*

9. Demand, as condition of trial by jury. *Sutton v. Gunn*, 652.

CONSTRUCTION. See *Code Sections*; *Deeds*; *Statutes*; *Wills*.

CONTINUANCE.

1. Witness absent, should be applied for. *Crawford v. R. Co.* 5.
2. Amendment simply correcting misnomer will not work. *Chat. R. Co. v. McLendon*, 676.  
New matter set up by, may work. *Hagerstown Co. v. Grizzard*, 574.  
Statute of limitations added to general issue, may work. *Sav. R. Co. v. Watson*, 795.

CONTRACTS. See *Interest*, 1; *Married Women*, 4, 5.

1. Fraudulent oral promise of vendee of two contiguous parcels of land described as one in the deed, contracted for separately, he paying for but one, fixes trust on him as to the other. *Brown v. Doane*, 32.  
Promise made with intent to break it, and mere breach of promise not fraudulent in itself, distinction. *Ib.*
2. Ambiguous: written undertaking to pay for land on receipt of complete chain of paper title, vendor's duty to procure execution of it, explainable by parol. *Ib.* See 21 below.
3. Live-stock shipment under special contract; liability of carrier. *Nashville R. Co. v. Heggie*, 210.
4. Landlord and cropper; laborer's lien foreclosure after payment of rent and advances. *McElmurray v. Turner*, 215.
5. Broker's memorandum of, referring to additional terms left in parol, insufficient. *Lester v. Heidi*, 226.
6. Futures, buying and selling of, is gambling and not protected by interstate commerce clause. *Alexander v. State*, 246.  
Penalty of tax act for not registering and paying license applies to resident agent of New York firm, though contract not completed by him. *Ib.*
7. Carrier not compelled to issue through bills of lading. *Coles v. Central R. Co.* 251.
8. Witness to, not produced, nor signature proved, paper rejected. *Hudson v. Puett*, 341.
9. Hiring to take charge of ship, extinguish fire and protect cargo, discharge of servant without cause before work completed, gave right to recover for breach. *Horan v. Strachan*, 408.
10. Custom reasonable, contract with reference to. *Ib.*
11. Sale of note not made if holder received payment without information of buyer's intent. *Cason v. Heath*, 438.

12. Changed or modified, governs; consideration, that it was executed; representations of plaintiff pleaded to suit on. *McGregor v. Bensinger*, 439.
13. Rescission, sale or return of goods is privilege of; reasonable time for return after expiration of period. *Newburger v. Hoyt*, 508.
14. Malice in violating, not relevant in suit for breach of. *Chat. R. Co. v. McLendon*, 517.
15. Complete, by cablegrams and letters. *Gartner v. Hand*, 558.
16. Rescission of land sale for fraud by failure of title to land given in part payment. *Bell v. Hutchings*, 532.  
Offer to convey other lands of same kind, no compliance. *Ib.*
17. Antenuptial, by husband, for payment by his executors to his wife, on his death, not testamentary, when. *Huguley v. Lanier*, 637.  
Obligatory on his estate, and barred dower. *Ib.*
18. Performance postponed till death, promise obligatory, though in parol. *Ib.*
19. Will, contract to make, enforceable. *Ib.*
20. Carrier's, for through shipment, liability under. *Central R. Co. v. Skellie*, 686.
21. Parol evidence to explain ambiguity in. *Johnston v. Patterson*, 725.
22. Copy of, error in admitting, cured by introduction of original by other party. *Stewart v. DeLoach*, 729.

CONVERSION. See *Bailments*; *Railroads*, 13.

CORPORATIONS. See *Churches*, 3; *Municipal Corporations*.

CORPUS DELICTI. See *Criminal Law*, 4, 5.

COSTS. See *Criminal Law*, 22; *Executions*, 2; *Practice in Superior Court*, 15.

COUNTY MATTERS. See *Militia Districts*.

COURTS. See *Constitutional Law*, 2; *Jurisdiction*; *Practice*.

#### CRIMINAL LAW.

1. Insane delusion or irresistible impulse not shown by opinion of non-expert from circumstances of stabbing. *Patterson v. State*, 70.
2. Charge need not submit law as to offences less than indictment, if not suggested by evidence. *Ib.*
3. Assault to murder, verdict required. *Ib.*
4. Larceny from wholesale store, *corpus delicti* of, not shown without proof of stealing rather than sale of the goods. *Johnson v. State*, 90.

5. Confession doubtful or contradictory, by man of good character, will not convict, if *corpus delicti* uncertain. *Ib.*
6. Murder shown by evidence. *Bone v. State*, 108; *Sutherland v. State*, 515.  
Killing to prevent further visits to daughter for improper purposes not shown. *Bone v. State*, 108.
7. Self-defence, charge on justifiable homicide covered, here. *Ib.*
8. Justifiable homicide, "other instances" of, than those enumerated in the code, §4330, fairly left to jury. *Ib.*
9. Remarks of judge held no injury to prisoner, and not subject to review. *Ib.*
10. Prisoner's statement, charge on, held not error, but language of statute preferable. *Ib.*
11. Stabbing, evidence sustaining verdict. *Francis v. State*, 123.
12. Cheating and swindling, what extenuating evidence rejected. *Culver v. State*, 197.
13. Futures, buying or selling of, by resident agent of persons in New York, without registry and payment for license. *Alexander v. State*, 246.  
Contract need not be completed by agent, for penalty to apply. *Ib.*
14. Weapon concealed by carrying in basket or bag on arm and not for transportation alone. *Boles v. State*, 255.
15. Confession of larcenies at various times, not objectionable as too general, when. *Griffin v. State*, 257.  
Induced by promises, what was confessed should appear, if material. *Ib.*
16. Larceny, presumption of, from possession of stolen goods, is of fact for jury, not of law. *Ib.*
17. Waive jury in misdemeanor case, defendant can. Withdrawal after entry into trial, not allowed. *Logan v. State*, 266.  
"Puts himself upon the country" in waiver, surplusage. *Ib.*
18. Assault by attempt to commit injury, desisting from, does not relieve of guilt. *Bishop v. State*, 329.
19. Evidence of *particeps criminis* not newly discovered, when. *Statham v. State*, 332.
20. Murder, conviction not upheld. *King v. State*, 355.  
Circumstantial evidence not showing motive or connection, and not excluding every other reasonable hypothesis. *Ib.*
21. Abusive language proved as laid, other words proved in rebuttal to prisoner's statement. *Porter v. State*, 362.
22. Costs, fees of how many of State's witnesses chargeable to defendant convicted. *Brown v. State*, 375.

23. Bail not bound for principal's appearance at term subsequent to that of conviction and sentence, when. *Roberts v. Gordon*, 386.
24. Burglary, indictment for, may describe house as husband's, though ownership in wife. *Yarborough v. State*, 396.  
Verdict of guilty convicts of, though larceny from house also charged and not proved. *Ib.*
25. Larceny from house of five-dollar bill charged, conviction of simple larceny illegal. *Allen v. State*, 399.
26. Indictment for misdemeanor, verdict for felony, judgment arrested. *Ib.*
27. Character of defendant not proved, warrants no inference of guilt. *Bennett v. State*, 403.  
Presumption of law as to. *Ib.*
28. Liquor selling, weak case on facts. *Phillips v. State*, 427.  
Evidence authorized verdict. *Christian v. State*, 430.
29. Indictment not alleging day or month of offence should be objected to on arraignment; too late after conviction. *Phillips v. State*, 427.
30. Affidavit for mayor's warrant for violating city ordinance should show how violated. *Mayor v. Alexander*, 455.
31. Adultery and fornication with unmarried woman charged, her marriage appearing, conviction not sustained. *Williams v. State*, 548.  
Hearsay declaration by her as to his death, not received. *Ib.*
32. Larceny (horse stealing), description of animal in indictment must be how full. *Brown v. State*, 633.  
Special demurrer on arraignment, sustainable. *Ib.*
33. Larceny after trust, indictment for, not alleging defendant was bailee, charging disposition in alternative, not stating purpose, bad on special demurrer. *Sanders v. State*, 717.  
Description, 15 head of beef cattle worth \$20 per head, sufficient. *Ib.*
34. Liquor-sale to minor, authority for, must be special for each occasion. *Gill v. State*, 751; *Dixon v. State*, 754.
35. Burglar's identity shown. *Matthews v. State*, 782.  
Conviction authorized. *Ib.* 804.  
Confession of. *Ib.*

CROPPERS. See *Landlord and Tenant*, 2, 3.

CUSTOM (PORT OF SAVANNAH).

1. Contract with reference to. *Horan v. Strachan*, 408.
2. Reasonable fee for attending ship in distress, amount of, not fixed for every case.

3. Local custom not binding on resident of Europe, unless. *Ib.*
4. Commission on disbursements for vessel, not recoverable if not furnished by agent. *Ib.*
5. Opinion of witnesses do not prove existence of. *Ib.*

## DAMAGES.

1. Appeal frivolous. *Clark v. Fee*, 9.
2. Delay, writ of error for. *Ib.*
3. Excessive: railroad engine-driver, permanent injuries, \$2,266 are not. *Ga. P. R. Co. v. Bowers*, 22.  
     Passenger, boy, permanent injuries, \$5,000 are not. *Richmond & D. R. Co. v. Childress*, 85.  
     Run over and mutilated, boy, \$7,000 are not. *Sav. R. Co. v. Smith*, 229.  
     Conductor of freight-train, total disability, physical wreck, \$18,044 are not. *Ga. P. R. Co. v. Dooley*, 295.  
     Battery by conductor on passenger, repeated, \$2,000 are not. *Sav. R. Co. v. Bryan*, 312.  
     Ship-loader, leg crushed, permanent injuries, \$1,000 are not. *Ocean S. Co. v. Matthews*, 418.  
     Passenger expelled wrongfully, \$1,000 are not, here: *Ga. R. Co. v. Dougherty*, 744. \$750 are, here: *Ga. R. Co. v. Eskew*, 641.  
     Each case decided on its own facts. *Ib.*
4. Charge on, correct, definite and full. *Chat. Co. v. Sullivan*, 50.  
     Delay in preparing premises for contractor. *Ib.*  
     Measure incorrect, cured by direction to write off. *Ib.*
5. Penalty, action against telegraph company for, is not suit for damages. *Western U. Tel. Co. v. Cooledge*, 104.
6. Permanent injuries to person, no fixed rule for estimating. *Richmond & D. Railroad Co. v. Allison*, 145.
7. Wages, increase of, by probable promotion in office, not proper to be proved. *Ib.*
8. Remote, not recoverable by widow against barkeeper who sold liquor to slayer of her husband. *Belding v. Johnson*, 177.
9. Carrier's liability for goods lost by flood, held two days after arrival and demand. *Richmond & D. R. Co. v. Benson*, 203.
10. Attorney's fees not added to actual, without evidence of bad faith or stubborn litigiousness. *Ib.* See 14 below.
11. Homicide of child who contributed to her support and on whom she was partly dependent, mother may recover for. *Daniels v. R. Co.* 236.
12. Mill dam maintained, overflowing land, arbitrators' award covers what. *Fowler v. Jackson*, 338.
13. Cattle killed in premises not enclosed by lawful fence, recovery upheld. *Crawford v. Ryals*, 349.

14. Attorney's fees for defending malicious suit, defendant may have. *Farrar v. Brackett*, 463.  
Too large, ordered reduced by Supreme Court. *Ib.*
15. Rent or hire alleged as part of, in suit for tort. *Ib.*  
Recoverable by party illegally deprived of property. *McCaulla v. Murphy*, 476.
16. Fencing not actually built but made necessary, no recovery for. *Chat. R. Co. v. McLendon*, 517.
17. Contract, malice in violating, not considered in suit for breach. *Ib.*
18. Punitive and compensatory, involved, intention material; how shown. *Ga. R. Co. v. Eskew*, 641.  
Adjusted to circumstances. *Ib.*
19. Consequential, duty of expelled railroad passenger to lighten. *Ib.*
20. Wounded feelings, compensation for, adjusted to actual case. *Ib.*
21. Freight not delivered in reasonable time, measure. *Central R. Co. v. Skellie*, 686.
22. Recoupment in defence to distress warrant. *Johnston v. Patterson*, 725.

DEBTOR AND CREDITOR. See *Garnishment*; *Homestead*, 5; *Husband and Wife*, 7.

1. Account made by broker, sued on, recovery. *Clark v. Fee*, 9.  
For lumber under contract, items correct, due and unpaid, *prima facie* recovery. *Bowe v. Gress*, 17.
2. Appeal to postpone collection of debt, frivolous. *Clark*, 9.
3. Malicious suit, whether garnishment was, illustrated by previous application for injunction and receiver with order of denial. *Schumann v. Torbett*, 25.
4. Judgment not allowed to sell part of property of insolvent in receiver's hands, by special order. *Sullivan v. McDonald*, 78.
5. Insolvent traders' firm dissolved, and stock seized by legal process, act of 1881 not applicable. *Kimbrell v. Walters*, 99.  
Injunction against selling or disposing of property, generally not granted for creditors without lien. But may be granted as to goods procured of them by fraud. *Ib.*
6. Partnership debt made of individual debt of partner, and mortgage given. *Veal v. Keely*, 130.
7. Attachment against fraudulent debtor not authorized by attorney's affidavit not positive as to grounds. *Moore v. Neill*, 186.  
Authorized by affidavit of debtor himself, admitting intent to hinder and delay. *Ib.*
8. Redemption by administrator of wife, of title held by her creditor as security, and conclusion of co-heir, in same action. *Williams v. Wheaton*, 223.



9. Bank insolvent, preferences by, prohibited by act of 1833 (Code, §4429), though legal by other debtors under act of 1818. *Hill v. Bank*, 284.
10. Receivers under creditors' bill acquired all rights of assignees, when. *Ib.*
11. *Bona fide* purchasers without notice, what creditors of insolvent bank are. *Ib.*
12. Married woman's creditor not excluded by claim for year's support, under act of 1871. *Phelps v. Daniel*, 367.
13. Mortgagees on money rule, issues between, demurrable, when. *Vance v. Roberts*, 457.  
     Collaterals held by, not collected, not charged to holders, but still assets for creditors. *Ib.*  
     Defeasible deed and rents held by, do not compel relinquishment of lien on fund in court. *Ib.*

## DEEDS.

1. Bounded by public highway, land conveyed extends to centre of road. *Silvey v. McCool*, 1.  
     Easement only in the public. *Ib.*
2. Survey based on, oral evidence illustrated by. *Ib.*
3. Procurement of, without consideration and by fraud and undue influence, conflicting evidence as to; injunction and receiver denied. *Nesbit v. Donald*, 26.  
     By false oral promise, constructive trust for vendor fastened in equity. *Brown v. Doane*, 32.
4. Estoppel by attesting conveyance by remaindermen, none against life tenant. *Fleming v. Ray*, 533.
5. Wild's case applies to construction of, as well as of will. *Baird v. Brookin*, 713.
6. To husband, trustee for wife, in 1881, put legal and equitable title in her, though his money paid. *Payton*, 773.
7. To wife, for life, subject to charge for support of husband, remainder in fee to children; construed. *Watson v. Goolsby*, 806.
8. Non-delivery of, defendant in ejectment not competent to testify to, when; maker, not a party, was competent, how. *Harrison v. Perry*, 813.

## DEMAND.

1. Evidence not showing contract as to, not involved. *Western U. Tel. Co. v. Hill*, 501.
2. Action of ejectment only necessary, if right of entry complete. *Ga. R. Co. v. Mayor*, 586.

3. For jury trial, need not be made before service of notice, though statute says on first day of return term. *Sutton v. Gunn*, 652.  
Condition of, constitutional. *Ib.*

DEMURRER. See *Practice in Superior Court*, 30, 31.

#### DISPOSSESSORY WARRANT.

Bond of tenant not broken by dismissal of counter-affidavit and execution of warrant, with no recovery by verdict. *Clark v. Lee*, 28.

#### DISTRESS WARRANT.

1. Amendment of affidavit for, confining claim to rent, dismissal prevented. *Jones v. Eubanks*, 616.
2. Fund held up for proper warrant to be sued out, may be. *Ib.*
3. Growing crop levied on, among other things, entire levy not rejected. *Johnston v. Patterson*, 725.
4. Set-off of matters independent of rent contract, not allowable. *Ib.*
5. Recoupment of damages by plaintiff's breach of rent contract, allowed without amendment of counter-affidavit. *Ib.*

DIVORCE. See *Marriage and Divorce*.

#### EJECTMENT.

1. Permanent improvements, *bona fide* purchaser from life-tenant cannot charge remaindermen for, save as set-off against meane profits. *Taylor v. Kemp*, 181.  
Equitable prayer for sale and distribution, denied. *Ib.*
2. *Prima facie* right to recover in son of donee in deed of gift. *Watts v. Starr*, 395.
3. Injunction and receiver not granted against insolvent defendant in, when. *Davis v. Taylor*, 506.
4. Remaindermen's vendees cannot recover before end of estate for life. *Fleming v. Ray*, 533.
5. Equitable defence to, changes rule as to recovery by all or none of tenants in common. *Milner v. Vandivere*, 540.  
Sale for year's support set up as. *Ib.*
6. Tender of purchase money to defendant before suit, not required where sale illegal. *Ib.*
7. Grant to railroad company not complied with, recovery without demand. *Ga. R. Co. v. Mayor*, 585.
8. Possession of decedent, heirs may recover on, unless defendant show better adverse title. *Wolfe v. Baxter*, 705.
9. Mortgage of decedent set up in defence to, by purchaser at sale thereunder, when. *Wilkins v. McGehee*, 764.

10. Witness, defendant not competent, to prove non-delivery of deed, when ; maker of it, not a party, was competent, how. *Harri-son v. Perry*, 813.

ELECTION. See *Mortgages*, 10.

#### ELECTIONS.

1. Power given by statute to lay railroad tracks in streets, exhausted by first ; second invalid. *Sav. & W. R. Co. v. Woodruff*, 96.
2. Registration determines whether two thirds voted to incur debt. *Gavin v. City*, 132.  
Supersedes ordinary rule for ascertaining majority. *Ib.*
3. Municipal, for schools, acquiesced in till after school begun, taxation for, not enjoined. *Irvin v. Gregory*, 605.
4. Advertisement for, once omitted, treated as mere irregularity, when. *Ib.*
5. Stock-law, result of, proclaimed over objections, *certiorari* will not lie. *Mealows v. Taylor*, 804.  
Writ of error pending, to refusal to sustain *caveat* to petition for election, immaterial. *Ib.*

EQUITY. See *Jurisdiction*, 8.

1. Trust fixed by, on vendee of two parcels of land in one deed, he paying for one but not the other, for his fraudulent oral promise to vendor. *Brown v. Doane*, 32.
2. Receiver appointed for insolvent debtor, whole estate must be administered by court ; special order to judgment creditor to sell, improper. *Sullivan v. McDonald*, 76.  
Not appointed if liens will consume estate. *Ib.*
3. *Bona fide* purchaser's prayer for sale of land and distribution between him and plaintiffs in ejectment, denied, when. *Taylor v. Kemp*, 181.
4. Subrogation of purchaser at void sale under mortgage foreclosure to rights of mortgagee. *Dutcher v. Hobby*, 198.
5. Multifarious, administrator's action to redeem land from his wife's creditor and to conclude co-heir, is not, when. *Williams v. Wheaton*, 223.
6. Trust fund in hands of transferees of insolvent bank with notice, receivers directed to sue for. *Hill v. Bank*, 284.
7. Exhibits, is rule 4 as to, fully applicable since act of 1887 ? *Lyon, v. Bank*, 485.  
Right result not disturbed because copy not annexed. *Ib.*
8. Decree for appropriate relief under allegations and admissions, upon what verdict. *Ib.*
9. Church subjected in, for payment of pastor. *Ib.*

10. Ejectment, plea to, changing rule as to recovery by all or none of tenants in common. *Milner v. Vandivere*, 540.
11. Rescission of land trade for fraud, decree proper. *Bell v. Hutchings*, 562.

**ESTATES.** See *Administrators and Executors*; *Title*.

1. For life only, taken under will here. *Taylor v. Kemp*, 181.
2. Remaindermen not liable to respond to purchaser of life-tenant for permanent improvements, except as set-off to mesne profits. *Ib*.
3. In common, by conveyance of one fourth of lot 931, etc., i. e. one fourth of the lot undivided. *Boyd v. Wilson*, 382.  
By foreclosure sale of undivided interest; purchaser takes no definite subdivision. *Myers v. Pierce*, 786.
4. In remainder, by devise to son, his wife and children, here. *Fleming v. Ray*, 533.
5. Estopped from acquiring, for life, life-tenant is not, by attesting deed of remaindermen his children. *Ib*.
6. Children born subsequently to deed to A as trustee for B and her children, took no interest. *Baird v. Brookin*, 709.
7. Life, subject to charge for support of husband, remainder to children; deed construed. *Watson v. Goolbsy*, 806.

**ESTOPPEL.**

1. Waiver of jury trial by defendant in misdemeanor case, not attacked after conviction. *Logan v. State*, 266.
2. Attestation by life-tenant of deed from remaindermen his children, none. *Fleming v. Ray*, 533.
3. Executors of mortgagor present at sale under power in mortgage, may contest its validity. *Wilkins v. McGehee*, 764.
4. Individual and representative, difference. *Ib*.

**EVIDENCE.**

1. Deed giving highway as boundary, land extended to centre of road. *Silvey v. McCool*, 1.  
Survey based on, testimony illustrated by. *Ib*.
2. Mistake mutual, difference of value may be shown on plea of But difference not appearing, no reduction. *Ib*.
3. Newly discovered, as ground for new trial. *Crawford v. R. Co.* 5; *Chat. Co. v. Sullivan*, 51; *Statham v. State*, 331; *Statham v. Shellnut*, 377; *Langford v. Nabers*, 449; *Matthews v. State*, 782.  
For reopening decree. *Langford v. Nabers*, 449.
4. *Prima facie* case changing *onus*, insufficient to keep up preponderance. *Crawford v. R. Co.* 5.

5. Witness misunderstood or mistaken, might have been prevented.  
*Crawford v. R. Co.* 5.  
Non-expert's opinion from circumstances of stabbing, as to insanity of stabber, not received. *Patterson v. State*, 70.
6. Leading interrogatory to prove correctness of account sued on, allowable. *Clark v. Fee*, 9.
7. Brief of, blending both material and immaterial, verdict treated as correct in Supreme Court. *Bowe v. Gress*, 19.  
Whole, may be specified as one part of record. *Moore v. Huggins*, 342.  
Report of trial by questions and answers is not. *Stubbs v. State*, 773.
8. Positive and negative, not charged on, where both sets of witnesses are equally positive. *Ga. P. R. Co. v. Bowers*, 22.
9. Malicious suing out garnishment in question, previous application for injunction and receiver with order of refusal, relevant. *Schumann v. Torbett*, 25.
10. Parol, to explain ambiguous contract to pay for land when vendor procures complete chain of paper title. *Brown v. Doane*, 32.  
See 26, 56, below.
11. Partnership assets, payment of debts, etc., not shown by one partner in suit against the other, after dissolution, by what allegations. *Davis v. Wimberly*, 46.
12. Damages from delay in preparing premises for contractor, data shown. *Chat. Co. v. Sullivan*, 50.
13. Opinion of non-expert from circumstances of stabbing, that stabber was moved by insanity or impulse, rejected. *Patterson v. State*, 70.
14. Admissibility of, judge's reason for decision on, may be stated in hearing of jury. *Ib.*
15. Conflict in, settled by jury. *R. & D. R. Co. v. Davis*, 76; *R. & D. R. Co. v. Childress*, 85; *Davis v. Jackson*, 138; *Port Royal R. Co. v. Griffin*, 172; *Sav. R. Co. v. Smith*, 229; *Sav. R. Co. v. Bryan*, 313; *Ga. R. Co. v. Brown*, 320; *Ga. R. Co. v. Thompson*, 327; *Crawford v. Ryals*, 349; *East Tenn. R. Co. v. Warmack*, 351; *McCaulla v. Murphy*, 476; *Sutherland v. State*, 515; *Hagerstown Co. v. Grizzard*, 574; *Freeman v. Coleman*, 590; *Hooks v. Hays*, 797.
16. Presumption that goods were sold, not stolen, if not missed from the stock. *Johnson v. State*, 90.
17. Objections to, made when it was offered, must be specifically stated. *Bone v. State*, 108; *Griffin v. State*, 257; *Christian v. State*, 430; *Sharpton v. Johnson*, 443; *Sanders v. State*, 717.
18. Parol, as to contents of note, by witness not showing knowledge of the handwriting, not admissible. *Bone v. State*, 108.

19. Damages, measure of; probable increase of wages by promotion in office, not proved. *R. & D. R. Co. v. Allison*, 145.
20. Copy note introduced by administrator claiming priority over creditor of intestate. *Mandell v. Fulcher*, 166.
21. Deeds from sheriff for taxes, and from his vendee, not here objectionable. *Ib.*
22. Attorney's written statement that his client wished to borrow money, his authority not appearing, objectionable. *Ib.*
23. False representations as to ownership of place of given value, not extenuated by real ownership of other place of less value. *Culver v. State*, 197.
24. Bill of lading admitted against carrier without special proof of its execution or of the signer's agency. *Richmond & D. R. Co. v. Benson*, 203.
25. Admission, when acquiescence or silence at testimony on previous trial will not amount to. *McElmurray v. Turner*, 215.
26. Broker's memorandum of real estate sale, not aided by parol. *Lester v. Heidt*, 228.
27. Confession of larcenies at various times, not objectionable as too general, when. *Griffin v. State*, 258.  
Induced by promises, what was confessed should appear, if material. *Ib.*
28. Railroad-beds of other companies, condition of, not admissible. *Ga. P. R. Co. v. Dooley*, 295.
29. Contract, subscribing witness to, not produced, nor signature proved, rejected. *Hudson v. Puett*, 341.
30. Damages, erroneous admission of testimony as to, cured by small verdict. *East Tenn. R. Co. v. Warmack*, 351.
31. Circumstantial, not showing motive for or connection with homicide, and not excluding other hypotheses. *King v. State*, 355.
32. Abusive language in words other than those laid, proved in rebuttal to prisoner's statement. *Porter v. State*, 362.
33. Will of woman made in contemplation of her marriage, not shown by parol. *Ellis v. Darden*, 368.
34. Declarations used to impeach but not to establish the facts they affirm. *Watts v. Starr*, 392.
35. Custom in port as to fees for attendance on and disbursements for vessel in distress, what should appear. *Horan v. Strachan*, 408.  
Not proved by opinions of witnesses. *Ib.*
36. Revocation of agency, letters and surveys written after, admissible, when. *Ib.*
37. Mortgage, affidavit to foreclose, and execution, not rejected for variance as to amount. *Vance v. Roberts*, 462.

38. Declarations of attorney pending case, out of hearing of client, not received to prove malice. *Farrar v. Brackett*, 466.
39. Hire or rent, highest, intermediate or lowest amount proved, awarded in trover. *Ib.*  
Amount mill earned while leased, illustrative. *McCaula v. Murphy*, 476.
40. Question of law, answer to, by party, not heard. *Ib.*
41. Damages anticipated not provable, when. *Chat. R. Co. v. McLendon*, 517.
42. Claimants, telegram to, from defendant in *fi. fa.*, informing of levy, inadmissible. *Powell v. Brunner*, 531.
43. Payment on bill of goods, amount of, not appearing, amount that was due presumed. *Ib.*
44. Hearsay, wife's declaration based on, as to husband's death, not admissible, when. *Williams v. State*, 548.
45. Payment to State, receipt of comptroller-general showed. *Ga. R. Co. v. Mayor*, 585.
46. Levy dismissed for want of. *Freeman v. Sturgis*, 622.
47. Damages punitive and compensatory, involved, intention material; how shown. *Ga. R. Co. v. Eskew*, 641.  
Conductor's intention in words used to passenger, whether to eject him from train. *Ib.*
48. Statutes of other State construed by aid of attorneys residing there. *Chat. R. Co. v. Jackson*, 676.
49. Carriage contract, whether made, experience of shipper as to best route, admitted. *Central R. Co. v. Skellie*, 686.
50. Carrier's agent's admissions while transaction in progress, admissible. *Ib.*
51. Market price of fruit given by witness who received daily quotations, and by resident dealer. *Ib.*
52. Partner's sayings not in presence of other partner, not received to prove partnership, when. *Phillips v. Trowbridge*, 699.
53. Secondary, of contents of books and contracts of sale of partnership, not received before originals accounted for. *Ib.*
54. Title, possession of decedent *prima facie*. *Wolfe v. Baxter*, 705.
55. Levy of distress warrant on growing crop among other things, may be read to jury. *Johnston v. Patterson*, 725.
56. Parol, on matters as to which contract is silent or ambiguous, admissible. *Ib.*
57. Set-off of matters independent of contract, not proved. *Ib.*
58. Recoupment, damages proved by way of, against distress warrant. *Ib.*

59. Contract, error in admitting copy of, cured by introduction of original by other party. *Stewart v. DeLoach*, 729.
60. Declarations, to impeach, not allowed unless deceived, applies to State's witness on criminal trial. *Dixon v. State*, 754.
61. Burglar's identity, what testimony shows. *Matthews v. State*, 782, 804.
62. Mortgage transferred, shown by parol, when. *Hooks v. Hays*, 797.
63. Deed, delivery or non-delivery of, defendant in ejectment not a competent witness as to, when; maker, not a party, was competent, how. *Harrison v. Perry*, 813.
- Presumption of delivery. *Ib.*

## EXECUTIONS.

1. Tax, transferred, not recorded, postponed to judgment. *Clarke v. Douglass*, 125.  
Extinguished as to third persons. *Wilson v. Herrington*, 777.  
Payment in full, including all costs, precedes transfer. *Ib.*
2. Cost, issued by clerk for himself and other officers of court, good. *Vining v. Officers*, 127.  
Including witness fees, issued from judgment for officers of court, good. *Ib.*
3. Tax, levy definite and certain, when. *Boyd v. Wilson*, 379.  
Pointing out of property for, governed by code, §891, not §3641. *Ib.*
4. Tax, mode of issuance, where owner of realty is unknown or doubtful. *Burns v. Lewis*, 592.
5. Tax, without unsigned receipt attached, irregular, not void. *Wilson v. Herrington*, 777.

EXECUTORS. See *Administrators and Executors*.

## FALSE IMPRISONMENT.

1. Warrant regularly and properly sued out, and arrest under it proper and legal, none. *Joiner v. Ocean S. Co.* 238.
2. Burden on plaintiff to show malice and want of probable cause. *Ib.*
3. Probable cause shown, malice immaterial. *Ib.*

## FORCIBLE ENTRY AND DETAINER.

Manner, means or nature of force used need not be described in affidavit and summons. *McAlpin v. Purse*, 271.

FRAUD. See *Attachments*, 1-3; *Deeds*, 3; *Judgments*, 2; *Levy and Sale*, 4.

## FRAUDS, STATUTE OF.

Broker's memorandum of real estate sale, referring to additional terms left in parol, insufficient. *Lester v. Heidt*, 228.



FUTURES. See *Contracts*, 6.

#### GARNISHMENT.

1. Blacksmith subject to, if proprietor of shop. *Tatum v. Zachry*, 573.
2. Insurance money unpaid, subject to, though previous delivery of policy and power of attorney to collect, with oral direction to apply proceeds. *Greenwood v. Boyd*, 582.

GIFTS. See *Advancements*; *Ejectment*, 2; *Title*, 8.

GRANTS. See *Ejectment*, 7.

HIRING. See *Bailments*.

#### HOMESTEAD.

1. Levy may be on separate interest of head of family as defendant in execution. *Vining v. Officers*, 128.
2. Stepmother undertaking care and support of minors, became head of family, on death of testator. *Holloway*, 576.
3. Termination of, whether at majority of minors or at death of stepmother. *Ib.*  
As to creditors, at her death. *Ib.*
4. Divorce takes wife out of family, and she is no longer a beneficiary. *Burns v. Lewis*, 591.
5. Creditor's proceeding to subject, must conform to remedy enforceable against trust estate. *Ib.*
6. Attachment for non-residence of owner, not subject to. *Ib.*  
Judgment on, for debt of former beneficiary after termination, void on face. *Ib.*
7. Sold under levy made before application for, with notice, purchaser took fee; entitled to possession after expiration. *Grace v. Kezar*, 697.

#### HUSBAND AND WIFE.

1. Land held by administrator of husband, whether first liable for debts of wife from whom it was inherited. *Mandell v. Fulcher*, 166.
2. Title of husband recognized by wife by taking mortgage from him, effect on her subsequent claim. *Silvey v. Chamblee*, 333.
3. Attorney of wife foreclosing mortgage against husband without her knowledge, bound her. *Ib.*
4. Head of house owned by wife, husband is. *Yarborough v. State*, 396.

5. Divorce total, found by second jury, and alimony disallowed, husband's property in schedule remains his, though no decree entered. *Burns v. Lewis*, 591.  
Marriage dissolved, though verdict silent as to rights and disabilities, if not set aside. *Const.* 1868. *Ib.*
6. Homestead, divorced wife no beneficiary of. *Ib.*
7. Antenuptial contract for payment by husband's executors to his wife on his death, not testamentary, but made him her debtor, and barred dower. *Huguley v. Lanier*, 640.
8. Benefit of supplies received by wife, credit given to husband, no liability on her, when. *Glass v. Steadman*, 696.
9. Trust executed as soon as created by deed to husband, trustee for wife, in 1881; property became her separate estate both legally and equitably. *Payton*, 773.
10. Injunction interlocutory, to control possession of family dwelling after separation, denied. *Ib.*

ILLEGALITY. See *Levy and Sale*.

1. Execution for street improvement assessment, defence to, authorized by statute. *Bacon v. Mayor*, 301.  
Affidavit here entitled affiant to trial. *Ib.*  
Ministerial acts, legality and accuracy of, questioned under general affidavit. *Ib.*
2. Justice should dismiss, if affiant fail to appear; not try *ex parte*. *Wade v. Wisenand*, 482.
3. Agent may make affidavit of, without written power. *Cook v. Buchanan*, 760.  
*Aliter*, claim affidavit *in forma pauperis*. *Ib.*

IMPEACHMENT. See *Witness*, 10, 12.

INDICTMENT. See *Criminal Law*, 24-26, 29, 32, 33.

INFANTS. See *Limitations*, 1; *Master and Servant*, 2.

INJUNCTION. See *Injunction and Receiver*.

1. Railroad construction within ten miles of other road being constructed, not enjoined. *Macon & A. Railroad Co. v. M. & D. Railroad Co.* 83.  
Side-tracks and turnouts in city streets enjoined for citizen alleging special damage to his real estate, though his motive for purchasing it was not disinterested. *Sav. & W. R. Co. v. Woodruff*, 94.
2. Tax-executions temporarily restrained, when. *Magruder v. City Council*, 220.

3. Judgment in justice's court obtained by fraud of plaintiff's counsel, petition to restrain enforcement, good. *Lee v. Arnsdorff*, 264.  
Entry on docket lacking, defendant's remedy not by. *Ib.*
4. Interlocutory, urgency not requiring. *Hill v. R. Co.* 574.
5. Tax for municipal schools not enjoined for petitioners who voted in favor of their establishment or acquiesced until school begun. *Irvin v. Gregory*, 605.  
Wrong acts of board of education no cause for. *Ib.*
6. Husband and wife separated, possession in him of her house not interfered with, when. *Payton*, 778.
7. Mortgagee of two parcels not enjoined by third person to await election by mortgagor as to which one she will relinquish to him. *Myers v. Pierce*, 786.

#### INJUNCTION AND RECEIVER.

1. Deed procured by fraud and undue influence, evidence conflicting, denied. *Nesbit v. Donald*, 27.
2. Insolvent debtors: estate covered by liens, not granted. *Sullivan v. McDonald*, 78.  
Liens small in proportion, may be granted in proper case. *Ib.*  
Creditors without lien cannot have, generally. *Kimbrell v. Walters*, 100.  
Not granted against other creditors holding lien, to hold up property in their hands. *Ib.*  
May be granted as to goods procured by fraud. *Ib.*  
Act of 1881 not applicable to firm dissolved, and whose stock has been seized a week by legal process. *Ib.*
3. Partner who purchased interest and made part payment may maintain petition for, against other partner holding whole title till full purchase price paid. *Taylor v. Bliley*, 154.  
Discretion not abused. *Ib.* 163.
4. Denied, discretion not abused, *lis pendens* securing corpus of realty, and solvency of defendant the income, etc. *Clay v. Clay*, 359.
5. Insolvency of defendant in ejectment not cause for, when. *Davis v. Taylor*, 506.
6. Timber cutting from land stopped by; evidence conflicting, discretion not abused. *Atwater v. Equitable Co.* 581.
7. Refusal right, though put on erroneous ground, affirmed. *Watson v. Goolsby*, 806.  
On erroneous construction of contract, discretion not exercised, reversed. *Taylor v. Bliley*, 154.

INSOLVENCY. See *Banks; Debtor and Creditor*, 4, 5, 9; *Ejectment*, 3; *Equity*, 2.

#### INTEREST.

1. Contract rate ran after maturity. *Silvey v. McCool* 1.

2. *Merck v. American Freehold Co.* 79 Ga. 213, controls. *Weems v. Jones*, 760.

INTERROGATORIES. See *Evidence*, 6.

INTERSTATE COMMERCE. See *Constitutional Law*, 4.

JUDGMENTS. See *Equity*, 2; *Homestead*, 6; *Liens*, 1, 4; *Nonsuit*, 2.

1. Dismissal of counter-affidavit and execution of dispossessionary warrant, without recovery by verdict, is no breach of tenant's bond. *Clark v. Lee*, 30.

*Aliter*: dismissal of suit by plaintiff in trover is judgment of restitution and breaks his bond. *Ib.*

2. Injunction against enforcement of, because obtained by fraudulent statement of plaintiff's counsel, allegation not here established. *Lee v. Arnsdorff*, 264.

3. Justice's court docket, not entered on, injunction or equitable petition not remedy for defendant. *Ib.*

Entry on, *nunc pro tunc*, query. *Ib.*

4. Arrest for uncertainty, none where verdict contains words referring to something not involved. *North R. Co. v. Crayton*, 499.

5. General, on attachment, by service of notice under code, §3309. *Sutton v. Gunn*, 652.

6. Verdict not necessary to, in attachment founded on conditional note, when. *Ib.*

7. Vacated, not merely suspended, by appeal, in Tennessee. *Chat. R. Co. v. Jackson*, 676.

8. Revocation of dismissal of appeal by subsequent order dismissing case. *Ib.*

Notice presumed given, or unnecessary. *Ib.*

9. Sale under, of life-estate, subject to charge created by deed. *Watson v. Goolbsy*, 806.

10. Set aside, for absence of counsel not on docket, error under what facts. *Bentley v. Finch*, 809.

#### JURISDICTION.

1. Superior court in second section, in county with city of 10,000 inhabitants, may try murder case. *Bone v. State*, 108.

2. Sale, order for, void for want of, on application of life-tenant as trustee, no trust existing. *Taylor v. Kemp*, 181.

3. Waived, question not raised by withdrawing plea and moving to dismiss. *East T. R. Co. v. Suddeth*, 388.

4. Waived, not by non-resident's so saying to constable who served him. *Wade v. Wisenant*, 482.

5. Supreme Court has none, where act of 1889 not complied with. See *Practice in Supreme Court*, 2.
6. Appeal dismissed in Tennessee suspended only the exercise of; resumed by subsequent order of revocation and dismissal of case. *Chat. R. Co. v. Jackson*, 676.
7. Superior court has none, after bill of exceptions signed. *Greer v. Holdridge*, 791.
8. Equitable, invoked on appeal from county court, by amendment, whether allowable. *Watson v. Goolsby*, 806.

JURY AND JURORS. See *Practice in Superior Court*, 16, 17, 18, 33.

JUSTICES' COURTS. See *Certiorari*.

1. Judgment of, not entered on docket, remedy of defendant not by injunction or equitable petition. *Lee v. Arnsdorff*, 264.  
Entry *nunc pro tunc*, query. *Ib.*
2. Illegality in, dismissed if affiant do not appear; not tried *ex parte*. *Wade v. Wisenont*, 482.
3. Jurisdiction of non-resident not acquired by service of constable and statement to him by party that he waived it. *Ib.*

LABORERS. See *Garnishment*, 1; *Landlord and Tenant*, 2.

LANDLORD AND TENANT.

1. Bond of tenant holding over not broken by dismissal of his counter-affidavit, and execution of dispossessionary warrant, with no recovery by verdict. *Clark v. Lee*, 28.
2. Cropper (widow) can foreclose laborer's lien for her labor and that of her minor children, after rent and advances paid. *McElmurray v. Turner*, 215.
3. Sale by cropper to tenant's landlord before payment to tenant passed no title. *Bryant v. Pugh*, 525.  
By sub-tenant, passed title. *Ib.*
4. Board of tenant included in lien. *Jones v. Eubanks*, 617.
5. Lien foreclosure without itemized account. *Ib.*
6. Removal of crops without consent. *Ib.*
7. Lien for supplies bought on credit of both, landlord has none; he is surety. *Brimberry v. Mansfield*, 792.

LARCENY. See *Criminal Law*, 4, 16, 24, 25, 32, 33.

LEGAL MAXIMS.

1. *A verbis legis non est recedendum* applied to general law for incorporating railroad companies. *Macon & A. R. Co. v. M. & D. R. Co.* 85.
2. *Expressio unius est exclusio alterius* applied to statute making commissioners for Bartow county. *Crawford v. Glasgow*, 359.

## LEVY AND SALE.

1. Sheriff levies cost execution though interested in it. *Vining v. Officers*, 127.
2. Excessiveness, when waived by owner. *Mandell v. Fulcher*, 166.
3. Definite and certain;  $\frac{1}{4}$  of lot 981, etc., is not any particular fourth but one undivided fourth. *Boyd v. Wilson*, 379.
4. Fraud of sheriff, purchaser not implicated in nor aware of, not affected by. *Ib.*  
Small price paid, but fair purchase. *Ib.*
5. Pointing out of property for tax-execution, governed by code, §891, not §3641. *Ib.*
6. Notice at tax sale by purchaser at previous judicial sale, not mentioning ambiguity in tax levy and advertisement, effect. *Ib.*
7. Certain enough, following loose description in decree to be enforced. *Western U. Tel. Co. v. Hill*, 500.
8. Dismissal of levy for want of evidence of title or possession in defendant. *Freeman v. Sturgis*, 622.
9. Homestead taken pending levy, purchaser at sale with notice took fee; not subject to levy, after expiration, under other execution against same defendant. *Grace v. Kezar*, 697.
10. Distress warrant, levy of, on growing crop among other things, no ground for rejection entirely. *Johnston v. Patterson*, 725.
11. Dismissal of levy improper, case reinstated at same term. *Wilson v. Herrington*, 777.

## LIBEL AND SLANDER.

1. Thief, actionable *per se*. *Roberts v. Ramsey*, 432.  
Intended as abuse only, and not to charge crime, for defendant to show. *Ib.*
2. Newspaper publication accusing several "or some of them" of offence amounting to moral turpitude, but no specific crime, actionable by individual. *Hardy v. Williamson*, 552.
3. Trade, office or profession affected, no special damage necessary to support action. *Ib.*

LICENSE. See *Streets*, 3; *Taxation*, 2.

LIENS. See *Equity*, 2.

1. Tax-execution transferred but not recorded, postponed to execution from judgment. *Clarke v. Douglass*, 125; *Wilson v. Herrington*, 777.
2. Attorneys', not divested by client paying amount required by decree and taking deed to another. *Davis v. Jackson*, 139.  
Not waived by taking note of client for fee. *Ib.*

3. Laborer's, foreclosed by cropper (widow) for the labor of herself and minor children. *McElmurray v. Turner*, 215.
4. Judgment superior to conveyance not recorded in thirty days nor until after levy. *Green v. Franklin*, 360.  
Inchoate, on growing crops, complete on their maturity. *Ib.*
5. Mortgagees with defeasible deed also, not compelled to relinquish lien on fund in court, when. *Vance v. Roberts*, 457.
6. Landlord's, foreclosed without itemized account. *Jones v. Eubanks*, 616.  
Board of tenant properly included. *Ib.*
7. Mortgage here was no lien on decree. *Myers v. Pierce*, 789.
8. Landlord has none, for supplies for which he stood surety, though he pay for them; *aliter* if he bought them on his own credit and so furnished them. *Brimberry v. Mansfield*, 732.

#### LIMITATIONS, STATUTE OF.

1. Infant heir not barred in action on administrator's bond not broken before 1866, though his guardian failed to sue. *Monroe v. Simmons*, 344.  
Failure of executor, administrator, or guardian to sue, is different case. *Ib.*
2. Penalty for not delivering telegram, suit for, barred in one year from when. *Western U. Tel. Co. v. Nunnally*, 503.

LIQUOR. See *Criminal Law*, 28, 34.

LIS PENDENS. See *Injunction and Receiver*, 4; *Pleadings*, 10.

LIVE-STOCK. See *Railroads*, 15.

LOST PAPERS. See *Practice in Superior Court*, 8.

MALICE. See *Criminal Law*, 3, 6; *Malicious Arrest*; *Malicious Suit*.

#### MALICIOUS ARREST.

1. Burden on plaintiff to show malice and want of probable cause. *Joiner v. Ocean S. Co.* 238.
2. Malice presumed from total want of probable cause. *Ib.*
3. Probable cause shown, malice immaterial. *Ib.*  
Shown by facts here. *Ib.*  
Advice of counsel as bearing on. *Ib.*

#### MALICIOUS SUIT.

1. Garnishment in question as, previous application for injunction and receiver by creditor against debtor (plaintiff) as insolvent trader, with order of denial, relevant. *Schumann v. Torbett*, 25.

2. Bail-trover in bad faith, unfounded and malicious, counsel fees given to defendant. *Farrar v. Brackett*, 463.
3. Declarations of attorney pending case, out of hearing of client, malice not proved by. *Ib.*

#### MARRIAGE AND DIVORCE.

1. Verdict of second jury for total divorce and disallowing alimony, husband's property in schedule remains his, though no decree entered. *Burns v. Lewis*, 591.  
Marriage dissolved by, under constitution of 1868, if not set aside, though silent as to rights and disabilities. *Ib.*
2. Homestead, divorced wife no longer a beneficiary of. *Ib.*
3. Antenuptial contract for payment by husband's executors to his wife on his death, not testamentary, but made him her debtor, and barred dower. *Huguley v. Lanier*, 640.

#### MARRIED WOMEN. See *Husband and Wife*.

1. Year's support not carved out of estate of, for minor child, where husband and father also survives. *Phelps v. Daniel*, 363.
2. Creditor of, not affected by act of 1871. *Ib.*
3. Will revoked by marriage, if containing no provision contemplating such event. *Ellis v. Darden*, 368.  
Contemplation not shown by parol. *Ib.*  
Act of 1866 and constitution of 1868 did not modify. *Ib.*
4. Original undertaker for goods furnished to another, of no benefit to her, is bound. *Freeman v. Coleman*, 590.
5. Accommodation acceptance by free trader, not binding. *Madden v. Blain*, 780.

#### MASTER AND SERVANT.

1. Rule violated by injured servant, no recovery. *Sloan v. R. Co.* 15; *Rome Co. v. Dempsey*, 499. See 8 below.  
General disregard of it by servants, no excuse, unless abrogated by master's acquiescence. *Sloan v. R. Co.* 15.
2. Infant servant of thirteen years, capacity of, to appreciate hazard and avoid danger, for jury. *Wynne v. Conklin*, 40.
3. Brakeman who steps on large clinker on margin of railroad track has no action for injury. *Lee v. C. R. Co.* 231.
4. Accidental injury, no recovery for. *Ib.*; *McNally v. R. Co.* 262; *East Tenn. Co. v. Suddeth*, 388.
5. Tool kept in average condition, duty discharged. *McNally*, 262.
6. Hirer of servant of another becomes master for the time; original master not liable for injury by servant's negligence while so hired. *Brown v. Smith*, 275.



7. Fellow-servant's negligence, steamship company not liable for; as, throwing bale of cotton into hold of ship without warning to servant below. *Ocean S. Co. v. Cheenry*, 278.
8. Rule reasonable, governing conduct as a servant, binds servant, when. *Ga. P. R. Co. v. Dooley*, 294.  
Requiring waiver of rights unconnected with duty, not binding without express agreement. *Ib.*
9. Fellow-servant's negligence, railroad company liable for, though in workshop and not about train, if injured servant blameless. *Ga. R. Co. v. Brown*, 320.
10. Railroad servant's lamp extinguished while making usual signal with it, or his falling from ore-car loaded as usual, no presumption in his favor. *East T. R. Co. v. Suddeth*, 388.
11. Discharge without cause before completion of contract gives right of recovery for breach. *Horan v. Strachan*, 408.
12. Hooks defective, liability for injury to servant from. *Ocean S. Co. v. Matthews*, 418.  
Previous use of without injury, no relief. *Ib.*  
Presumption of knowledge of, charged to master. *Ib.*  
Patent and obvious character, and age. *Ib.*
13. Cropper and tenant, relation between. *Bryant v. Pugh*, 525.
14. Coupling railroad-cars, whether draw-bar defective, and whether second effort negligent. *Ousley v. R. Co.* 538.

#### MILITIA DISTRICTS.

Bartow county commissioners cannot change. *Crawford v. Glasgow*, 358.

MINORS. See *Limitations*, 1; *Master and Servant*, 2; *Parent and Child*.

MISTAKE. See *Pleadings*, 1; *Witness*, 2.

MONEY RULE. See *Liens*, 1, 4, 5, 8; *Mortgages*, 3-6.

Issues on, demurrable. *Vance v. Roberts*, 457.

#### MORTGAGES.

1. Partnership may execute, to secure individual debt of partner. *Veal v. Keely*, 130.
2. Foreclosure void, purchaser at sale subrogated to rights of mortgagee. *Dutcher v. Hobby*, 198.
3. Reformation of, on money rule, without making mortgagor a party, not allowed. *Vance v. Roberts*, 457.
4. Variance from, in affidavit to foreclose, as to amount, not void foreclosure. *Ib.*  
Contested by mortgagor or opposing creditor, if too large. *Ib.*
5. Collaterals additional to, not collected, not charged to mortgagees on money rule. *Ib.*

6. Deed defeasible held in addition to, creditors not compelled to relinquish lien on money in court. *Ib.*
7. Power of sale in; revoked by death. *Wilkins v. McGehee*, 764.
8. Administration to pay debts, under previous order, cuts off mortgage of devisee on his undivided interest. *Myers v. Pierce*, 786.
9. Purchaser at foreclosure sale of undivided interest takes no definite subdivision. *Ib.*
10. Injunction not granted for third person, to await election by mortgagor as to which of two parcels she will relinquish to him; mortgagee elects by exposing one of them for sale. *Ib.*
11. Amendment of foreclosure suit allows parol evidence of transfer, when. *Hooks v. Hays*, 797.

MUNICIPAL CORPORATIONS. See *Schools; Streets.*

1. Election, registration for, determines whether majority or two thirds vote to incur debt. *Gavin v. City*, 132.
2. Affidavit for warrant for violation of ordinance should state how violated, not simply quote ordinance. *Mayor v. Alexander*, 455.
3. Can exception be taken by, to judgment on *certiorari*, setting aside conviction? *Ib.*
4. Taxation, assessment for, in Atlanta, especially where owner unknown or doubtful. *Burns v. Lewis*, 600.

MURDER. See *Criminal Law*, 6.

NEGLIGENCE.

1. Charge may omit instruction on items of, declared but not essential, when. *Crawford v. R. Co.* 5.
2. Presumption of, may be rebutted by evidence other than expert, that railroad iron was sound. *Ib.*
3. Rule violated by servant injured, no recovery. *Sloan v. R. Co.* 15; *Rome Co. v. Dempsey*, 499.  
General disregard of it by other servants, no excuse, unless abrogated by master's acquiescence. *Sloan v. R. Co.* 15.
4. Engineer not chargeable with, for approaching at high speed a station three miles before place of collision. *Ga. P. R. Co. v. Bowers*, 22.
5. Infant's capacity to appreciate hazard and provide against danger, for jury. *Wynne v. Conklin*, 40.
6. Crossing railroad track, injury here avoidable. *Atla. R. Co. v. Loftin*, 43.
7. Evidence as to, conflicting, verdict upheld. *Richmond & D. R. Co. v. Davis*, 76.

- Warranting verdict. *R. & D. R. Co. v. Childress*, 85; *Port Royal R. Co. v. Griffin*, 172. *Sav. R. Co. v. Smith*, 229; *Ga. R. Co. v. Brown*, 320; *East Tenn. R. Co. v. Warmack*, 351; *Ocean S. Co. v. Matthews*, 418.
8. Live-stock fell through trestle when running ahead of train; whistle blown and speed reduced; railroad employees free from. *Gay v. Wadley*, 103.
  9. Contributory, none here chargeable to plaintiff whose fence was burned by sparks from locomotive. *Port Royal R. Co. v. Griffin*, 172.
  10. Criminal; selling liquor to slayer when drunk; no recovery here by widow of the deceased. *Belding v. Johnson*, 177.
  11. Railroad cars standing on crossing, climbing between them was voluntary exposure. *Andrews v. R. Co.* 192.  
Going round to unusual place to avoid obstruction, diligence incumbent on company's servants. *Sav. R. Co. v. Smith*, 230.
  12. Carrier's, in holding freight two days after arrival and demand; liability for loss. *Richmond & D. R. Co. v. Benson*, 203.  
In keeping horses on cars over 28 hours without unloading for rest, food, etc., though owner's agent was deficient in urging unloading. *Nashville R. Co. v. Heggie*, 211.
  13. Railroad track, large clinker on margin of, is not. *Lee v. C. R. Co.* 231.
  14. Accidental injury without. *Ib.*; *McNally v. R. Co.* 262; *East Tenn. Co. v. Suddeth*, 388.
  15. Tool kept in average condition, duty discharged. *McNally*, 262.
  16. Servant's, while hired to another, original master not liable for. *Brown v. Smith*, 274.
  17. Fellow-servant's; failure of hatch-tender to warn servant in hold of ship of falling bale, or thrown down by other servant in hatch-tender's absence. *Ocean S. Co. v. Cheeney*, 278.
  18. Railroad-bed and cross-ties defective, liability for injury from. *Ga. P. R. Co. v. Dooley*, 295.
  19. Railroad-crossing, homicide at, without compliance with statute as to blowing and checking. *Woodruff v. R. Co.* 318. See 22 below.
  20. Fellow-servant's, in railroad workshops, liability for injury from, where injured servant blameless. *Ga. R. Co. v. Brown*, 320.
  21. Carrier's, in loss of passenger's trunk delivered to its agent. *Ga. R. Co. v. Thompson*, 327.
  22. Railroad-crossing, injury to persons, wagons and mules at, by running cars illegally. *East Tenn. R. Co. v. Warmack*, 351; *Chat. R. Co. v. Jackson*, 676.

23. Railroad lamp extinguished when making usual signal with it, raises no presumption of. *East T. R. Co. v. Suddeth*, 388.  
Ore-car loaded as usual, not improper; fall of servant from, accidental. *Ib.*
24. Master charged with knowledge of defective hooks; liability to injured servant who did not know. *Ocean S. Co. v. Matthews*, 418.
25. Coupling cars, draw-bar for, whether defective. *Ousley v. R. Co.* 538.  
Second effort at, on same occasion after failure at first, not necessarily inexcusable. *Ib.*
26. Homicide by railroad, what allegations sufficient. *Central R. Co. v. Hubbard*, 624.
27. Presumption of, under code, §3033, arises in all cases; question of removal, for jury. *Ib.*  
Rebutted, may be, by evidence of either party. *Ib.*
28. Charge grouping facts tending to show, must leave to jury. *Ib.*  
*Aliter* as to facts constituting, by law. *Ib.*
29. Allegations and proof must correspond in doubtful case for recovery. *Ib.*
30. Railroad conductor's mistake as to ticket, resulting in expulsion of passenger. *Ga. R. Co. v. Eskew*, 641.  
Agent's mistake in selling wrong ticket. *Ga. R. Co. v. Dougherty*, 744.
31. Railroad track walked on by aged deaf man, homicide by train avoidable by him. *Seats v. R. Co.* 811.

NEW TRIAL. See *Practice in Superior Court*.

1. Newly discovered evidence, as ground for. *Crawford v. R. Co.* 5;  
*Chat. Co. v. Sullivan*, 50; *Statham v. State*, 331; *Statham v. Shellnut*, 377; *Langford v. Nabers*, 449; *Matthews v. State*, 782.
2. Charge irrelevant, no cause for, when. *Chat. Co. v. Sullivan*, 50.  
Written, went out with jury, no objection, no ground for. *Ib.*
3. Grave error required to set aside correct second verdict. *Patterson v. State*, 74.
4. Error immaterial will not require. *Bone v. State*, 108; *Mandell v. Fulcher*, 166; *Griffin v. State*, 258; *Bell v. Hutchings*, 571.
5. Grounds for, not insisted on, not considered. *Davis v. Jackson*, 138.  
Not approved, not considered. *Christian v. State*, 430; *Hagerstown Co. v. Grizzard*, 574.  
As to admission or rejection of evidence, should set it out. *Ib.*; *Griffin v. State*, 258.
6. Reasons for grant of, not assignable as error. *Smith v. R. Co.* 195.

7. First grant not disturbed. *Ib.*; *Moore v. Huggins*, 342.  
Affirmed, with direction to nonsuit. *Lee v. C. R. Co.* 233.
8. Second, where verdict wrong under facts. *Cason v. Heath*, 438.
9. Third, denied if evidence for prevailing party sustains verdict.  
*Savannah R. Co. v. Smith*, 229.
10. Special questions not all answered by jury, granted. *Cooper v. Branch*, 234.

#### NONSUIT.

1. Damage case, weak but for jury. *Wynne v. Conklin*. 40.
2. Reinstatement after award of, in discretion of court; not reversed unless abused. *Central R. Co. v. Folds*, 42.  
Granted by Supreme Court in affirming judgment, with leave to amend. *Davis v. Wimberly*, 46.
3. Live-stock fell into trestle when running ahead of train, action nonsuited. *Gay v. Wadley*, 103.
4. Directed by Supreme Court in affirming grant of new trial. *Lee v. Central R. Co.* 232.
5. Homicide of child sued for by mother partly dependent on him for support, nonsuit error. *Daniels v. R. Co.* 237.
6. Receivers' suit for effects transferred by insolvent bank, evidence sufficient to prevent. *Hill v. Bank*, 285.
7. Killing cattle in premises not enclosed by lawful fence, evidence sufficient to prevent. *Crawford v. Ryals*, 349.
8. Slanderous words used, plaintiff's evidence need not refer them to particular transaction. *Roberts v. Ramsey*, 432.
9. Negligence of railroad and of servant coupling cars, for jury. *Ousley v. R. Co.* 538.

#### NOTICE. See *Elections*, 4.

1. Constructive, as to title. *Sharpton v. Johnson*, 448.
2. Record of divorce suit, to city tax-assessors, of cessation of interest in realty. *Burns v. Lewis*, 602.
3. Attachment, general judgment on, after service of. *Sutton v. Gunn*, 652.  
Demand for jury trial need not be made before actual service of, though statute says first day of return term. *Ib.*  
Process need not be annexed; notice suffices. *Ib.*  
Illiteracy no excuse for not making defence. *Ib.*
4. Of sanction of *certiorari*, not given by handing opposing counsel original papers. *Franke v. May*, 659.
5. Of resumption of jurisdiction, presumed given, or unnecessary, when. *Chat. R. Co. v. Jackson*, 676.

## NUISANCE.

1. Railroad tracks in city streets without statutory authority, enjoined. *Savannah & W. R. Co. v. Woodruff*, 96.
2. Public, may be complained of by citizen, though he purchased with notice the property to be affected by it. *Ib.*
3. Street obstruction summarily abated, if city had no power to consent to it. *Laing v. Mayor*, 758.

OFFICERS. See *Banks*, 2; *Levy and Sale*, 1, 4; *Sheriffs*.

## ORDINARY.

Appeal from judgment of, on objections to return of appraisers for year's support. *Phelps v. Daniel*, 363.

## PARENT AND CHILD.

1. Lien for labor of minors asserted by widowed mother. *McElmurray v. Turner*, 215.
2. Homicide of child on whom she was partly dependent for support and who contributed thereto, mother may recover for. *Daniels v. R. Co.* 236.
3. Step-mother can undertake care and support of minors, on father's death, and may have homestead. *Holloway*, 576.
4. Liquor-sale to minor not authorized by general written permit. *Gill v. State*, 751; *Dixon v. State*, 754.

PARTIES. See *Amendment*, 1, 13.

Usee's action in name of plaintiff without his consent, ratification of, relates to commencement. *Bowe v. Gress*, 17.

Amendment making him party, surplusage. *Ib.*

Equitable element gave usee right to use name of plaintiff corporation without cost to it; *semble*. *Ib.*

## PARTNERSHIP.

1. Dissolved; what evidence unwarranted by allegations of suit by one partner against the other. *Davis v. Wimberly*, 46.
2. Allegations and proof must correspond more strictly, in suit between partners, than on open account. *Ib.*
3. Mortgaged, firm assets may be, to secure individual debt of partner. *Veal v. Keely*, 130.
4. Injunction and receiver granted to partner against copartner holding the whole title till payment for interest purchased. *Taylor v. Bliley*, 154, 163.
5. Sayings of alleged partner not in presence of the other, not admissible to prove. *Phillips v. Trowbridge*, 699.
6. Books of, and contract of sale used by, should be accounted for, before secondary evidence of their contents admitted. *Ib.*

7. Assignment of accounts and title to goods in writing, by partner, legally given and cancelled. *Ib.*

PASSENGERS. See *Railroads*, 22, 25, 28, 32.

PAYMENT. See *Evidence*, 43, 45; *Promissory Notes*, 1.

PENALTIES. See *Telegraph Companies*.

PLEADINGS. See *Actions*; *Amendment*; *Practice in Superior Court*, 26, 30-32.

1. Mistake mutual, what evidence admitted on. *Silvey v. McCool*, 1.
  2. Question not made by, not decided by Supreme Court. *Nesbit v. Donald*, 26.
  3. Default in, no deprivation of right to strike jury and cross-examine witnesses. *Davis v. Wimberly*, 46.
  4. Allegations and proof must correspond more strictly in suit between partners than on open account. *Ib.*
  5. Consideration failure, to suit on contract; error to strike, here. *McGregor v. Bensinger*, 440.
  6. Damages, rent or hire alleged as part of, in single count in tort. *Farrar v. Brackett*, 464.
  7. Exhibits to, is 4th equity rule fully applicable since act of 1887? *Lyons v. Bank*, 485.
  8. Sworn to, need not be, in tort. *Hagerstown Co. v. Grizzard*, 574.
  9. Negligence, homicide by railroad, declaration not demurrable, when. *Central R. Co. v. Hubbard*, 624.  
Allegations and proof required to correspond in doubtful case for recovery. *Ib.*
  10. Abatement, pendency of prior suit in other State not pleaded in. *Chat. R. Co. v. Jackson*, 677.
  11. Declaration demurrable under allegations made, together with lack of others. *Glass v. Steadman*, 696.
- POWERS. See *Elections*, 1; *Sales*, 7; *Title*, 13.
- PRACTICE IN SUPERIOR COURT. See *Actions*; *Amendment*; *Certiorari*; *Charge of Court*; *Pleadings*.
1. Evidence should keep up preponderance, not merely change burden. *Crawford v. R. Co.* 5.  
Preparation for trial should precede announcement of ready, *Ib.*
  2. Witness absent, no continuance asked, no new trial. *Ib.*  
Misunderstood, no cause for new trial, when. *Ib.*  
Mistake by, that could have been prevented. *Ib.*  
Expert, not indispensable, when. *Ib.*

3. Appeal frivolous, damages assessed. *Clark v. Fee*, 9.
4. Reinstatement after nonsuit, discretion as to. *Central R. Co. v. Folds*, 42.  
Meritorious action. *Davis v. Wimberly*, 46.
5. Default in pleading, no deprivation of right to strike jury and cross-examine witnesses. *Davis v. Wimberly*, 46.  
Defendant may not introduce evidence, but plaintiff must still make out case. *Ib.*
6. Charge in writing allowed to go out with jury, only irregular; whether not better practice, query. *Chat. Co. v. Sullivan*, 50.
7. Evidence, reasons for rejection of, may be stated by judge in hearing of jury. *Patterson v. State*, 70.  
Admitted without objection, ruled out on defendant's motion, no hurt to him. *Christian v. State*, 430.
8. Lost declaration and process, copy of, established on what testimony. *Allen v. Mutual Co.* 74.
9. Service, order to perfect, at second term, or dismissal, in discretion of judge. *Ib.* See 20 below.
10. Receiver of insolvent debtor appointed, judgment creditor not allowed to sell part of estate by special order. *Sullivan v. McDonald*, 78.
11. Remarks of judge held no injury to prisoner and not reviewable. *Bone v. State*, 108.
12. Witness under rule hearing evidence from the stand, discretion to allow him to testify. *Ib.*  
May be allowed to testify in rebuttal of the prisoner's statement after hearing it. *Ib.*
13. Jurisdiction lacking to grant order of sale to life-tenant as trustee, no trust existing. *Taylor v. Kemp*, 182.
14. Verdict directed by court. *Ib.*; *Laing v. Mayor*, 756.
15. Costs discretionary with court. *Williams v. Wheaton*, 226.
16. Verdict not receivable for not answering special questions, and not forming basis of decree. *Cooper v. Branch*, 234.  
Issue not covered by, jury sent back. *Vance v. Roberts*, 458.
17. Jury trial waived by defendant in misdemeanor case. Withdrawal of waiver during trial, not allowed. *Logan v. State*, 266.
18. Verdict on former trial should be kept from jury, on request. *Ga. P. R. Co. v. Dooley*, 295.
19. Bench-docket entries import no leave to issue second process, nor extend time for service. *Peck v. LaRoche*, 314.
20. Service defective, acquiescence in, not implied if motion to dismiss promptly made at first term after. *Ib.*  
Motion should be sustained, when. *Ib.*



21. Award, exceptions to, what not proper. *Fowler v. Jackson*, 337.
22. Dismissal because claim for damages reduced below jurisdiction of city court by plaintiff not insisting on a part, prevented by renewing full claim. *Crawford v. Ryals*, 349.
23. Recharge in doubtful case should not be that case is too plain, or plain enough. *King v. State*, 355.
24. Appeal lies from judgment of ordinary on objections to return of appraisers for year's support. *Phelps v. Daniel*, 363.
25. Recognizance, bail discharged from, after sentence and without entry of *exoneretur*, when. *Roberts v. Gordon*, 387.
26. Jurisdiction waived by appearance and pleading, question not raised by withdrawing plea and moving to dismiss. *East T. R. Co. v. Suddeth*, 388.
27. Argument of counsel without evidence, though replying to similar argument of opposing counsel, allowed over objection, error. *Bennett v. State*, 401.
28. Indictment not alleging day or month of offence, not first objected to after conviction. *Phillips v. State*, 427.
29. Brief of evidence approved without hearing evidence as to what was testified, if judge remembers. *Ib.*
30. Demurrer acquiesced in by amendment, no demurrer at new trial to that amendment. *McAulla v. Murphy*, 476.  
Amendment not formally allowed, but acted on. *Ib.*  
Election to try on amendment, not necessary. *Ib.*  
General, pleads to merits. *Lyons v. Bank*, 485.
31. Service, question of, waived by appearance and demurrer. *Ib.*
32. Process, prayer for, omitted, amendable, and waived by appearance and pleading. *Ib.*
33. Polling jury in civil case, and manner of, discretion as to. *Bell v. Hutchings*, 562.
34. Questions submitted specifically to jury, submission of general question for decree also, improper. *Ib.*
35. Divorce, second verdict for, judgment not entered, effect. *Burns v. Lewis*, 591.
36. Reasons for ruling may be stated in hearing of jury. *Patterson v. State*, 70; *Jones v. Eubanks*, 617.
37. Sheriff's answer to rule found false by verdict on traverse, concludes defences that might have been set up. *O'Pry v. Kennedy*, 663.
38. Statutes of other State construed by aid of testimony of attorneys. *Chat. R. Co. v. Jackson*, 676.
39. Levy read to jury, though objectionable in part. *Johnston v. Patterson*, 725.

40. Contract, copy of, error in admitting, cured by introduction of original by other party. *Stewart v. DeLoach*, 729.
41. Levy improperly dismissed, general motion to reinstate for error on face of record, granted. *Wilson v. Herrington*, 777.
42. New trial grounds on rulings at previous term, too late. *Hooks v. Hays*, 797.
43. Pleas should be filed at first term, or counsel's name marked on docket, in suit on unconditional contract. *Bentley v. Finch*, 810.

## PRACTICE IN SUPREME COURT.

1. Damages in case brought for delay. *Clark v. Fee*, 9.
2. Specification of material parts of record omitted from bill of exceptions, writ of error unauthorized. *Alexander v. Williamson*, 13; *Pearce v. State*, 507; *Hopkins v. R. Co.* 658; *McLendon v. Hollis*, 763; *Stubbs v. State*, 773; *Monroe v. Stiger*, 780.  
What sufficient. *Moore v. Huggins*, 342.  
Questions made by parts not specified though sent up, not decided. *Milner v. Vandivere*, 541.
3. Evidence material and immaterial blended, violates act of 1889; and verdict treated as correct. *Bowe v. Gress*, 19.  
Brief of, as a whole, may be specified as one part. *Moore v. Huggins*, 342.  
Brief of, report of trial by questions and answers is not. *Stubbs v. State*, 773.
4. Question not made below, not decided. *Nesbit v. Donald*, 26; *Bibley v. Taylor*, 163.
5. Reinstatement of meritorious action properly nonsuited, here granted. *Davis v. Wimberly*, 47.
6. Direction, judgment affirmed or reversed with. *Ib.*; *Chat. Co. v. Sullivan*, 51; *Kimbrell v. Walters*, 100; *R. & D. R. Co. v. Benson*, 210; *Lee v. C. R. Co.* 233; *Peck v. LaRoche*, 318; *Horton v. Strachan*, 418; *Farrar v. Brackett*, 464; *Bryant v. Pugh*, 530.
7. Remarks of judge not reviewed. *Bone v. State*, 108.
8. Error without injury, no reversal. *Ib.*; *Mandell v. Fulcher*, 166; *Powell v. Brunner*, 531; *Bell v. Hutchings*, 562; *Dixon v. State*, 754.
9. Evidence, objections made to, when it was offered, must be specifically stated. *Bone v. State*, 108; *Griffin v. State*, 257; *Christian v. State*, 430; *Sharpton v. Johnson*, 443; *Sanders v. State*, 717.  
Exceptions as to admission or rejection of, should set it out. *Griffin v. State*, 257; *Hagerstown Co. v. Grizzard*, 574.

10. New trial grounds not considered if not insisted on. *Davis v. Jackson*, 138.
11. Demurrer general overruled, writ of error lies, though case still pending below, when. *City Council v. Lombard*, 165.
12. New trial, reasons for grant of, not assignable for error. *Smith v. R. Co.* 195.
13. Charge excepted to, stating independent propositions, must all be erroneous, to avail exceptant. *Ib.*
14. Motion to dismiss action overruled, held error, subsequent proceedings on trial not looked to. *Peck v. LaRoche*, 318.
15. Rehearing, petition for, denied. *Byrd v. Wilson*, 385.
16. Conviction by mayor and council set aside on *certiorari*, can municipality except? *Mayor v. Alexander*, 455.
17. Return term for ordinary cases is the first beginning after 30 days from filing bill of exceptions below. *Logan v. R. Co.* 493.  
Immaterial that transcript and bill of exceptions actually arrive before return day of earlier term, or that judge's certificate orders transmission to earlier term. *Ib.*  
Transferred to next term on motion. *Ib.*
18. Costs of additional parts of record taxed against defendant in error if not used. *Western U. Tel. Co. v. Hill*, 501; *Bell v. Hutchings*, 562; *Stewart v. DeLoach*, 729.
19. Questions for new trial indicated. *Central R. Co. v. Skellie*, 687.
20. Certificate to bill of exceptions omitting "certify," fatal. *Godbee v. McCathern*, 782.  
Once signed, jurisdiction ceases; second certificate relieving of laches in not serving and filing, not regarded. *Greer v. Holdridge*, 791.

**PRESCRIPTION.** See *Private Ways*; *Title*, 2, 10.

**PRESUMPT.ONS.** See *Criminal Law*, 16, 27; *Evidence*, 16, 43, 63; *Negligence*, 27; *Notice*, 5; *Verdict*, 11.

**PRINCIPAL AND AGENT.** See *Accounts*, 2; *Railroads*, 25, 28, 34, 35.

1. Hiring, contract of, is more than appointment of agent; discharge without cause gives right to recover for breach, when. *Horan v. Strachan*, 408.
2. Note, maker of, entrusted with money to buy it, paid it without informing the holder, liability. *Cason v. Heath*, 438.
3. Compensation lost by violation of trust. *Larry v. Baker*, 468.
4. Admissions of agent. *Central R. Co. v. Skellie*, 696; *Stewart v. DeLoach*, 729.
5. Writing not necessary to empower agent to make affidavit of illegality. *Cook v. Buchanan*, 760.

PRINCIPAL AND SURETY. See *Landlord and Tenant*, 7.

1. Conviction and sentence terminated liability of bail who did not stipulate to abide judgment. *Roberts v. Gordon*, 386.  
Allowance of time to pay fine, bail not affected by, without his assent. *Ib.*  
Recognizance strictly construed. *Ib.*
2. Discharge of surety by payment of note by principal with money entrusted to him to buy it. *Cason v. Heath*, 438.
3. Married woman contracting for goods furnished to another, of no benefit to her, is not surety. *Freeman v. Coleman*, 590.
4. Partner or surety, whether mortgagor was. *Phillips v. Trowbridge*, 699.
5. Married woman, though free trader, not bound by accommodation acceptance. *Madden v. Bluin*, 780.

PRISONER'S STATEMENT. See *Criminal Law*, 10, 21.

## PRIVATE WAYS.

- Prescriptive right to, not shown, not "declared permanent."  
*Herndon v. Strickland*, 323.  
"Declare permanent," ordinary or county commissioners not authorized to. *Ib.*

PROBABLE CAUSE. See *Malicious Arrest*.

## PROCESS.

1. Amendment of, when allowable. *R. & D. R. Co. v. Benson*, 203.
2. Second, issued by clerk in same suit without express order, is void. *Peck v. LaRoche*, 314.  
Continuance, entries of, on bench-docket at and after appearance term, import no leave to issue. *Ib.*
3. Service after appearance term not authorized by. *Ib.*  
Acquiescence in, not implied, if motion to dismiss promptly made at first term after. *Ib.*
4. Prayer for, omitted, amendment allowed. *Lyons v. Bank*, 485.

PROMISSORY NOTES. See *Acceptance*.

1. Payment and not sale of, where maker took money to buy, but did not inform holder. *Cason v. Heath*, 438.
2. Transfer without recourse of notes for mill, paid them, and title to mill passed to maker. *Farrar v. Brackett*, 464.
3. Payment or collateral, whether given as, by trustees of church. *Lyons v. Bank*, 485.
4. Payable after death of maker or of third person, may be. *Huguley v. Lanier*, 640.

RAILROADS. See *Damages*.

1. Track-iron sound, shown by non-experts. *Crawford v. R. Co.* 5.
2. Coupling cars with stick required by rule, no recovery for injury to hand. *Sloan v. R. Co.* 15; *Rome Co. v. Dempsey*, 499.
3. Rule disregarded by servants generally, no excuse to one of them, unless company acquiesced. *Sloan v. R. Co.* 15.
4. Signal lights, conflicting evidence as to. *Ga. P. R. Co. v. Bowers*, 22.
5. Speed in approaching station three miles before place of collision, not showing engineer negligent. *Ib.*
6. Crossing track not at public crossing, injury avoidable, no recovery, though company negligent. *Atla. R. Co. v. Loftin*, 43.
7. Cause of death, whether by injury or by disease, settled by jury. *R. & D. R. Co. v. Davis*, 76.  
Of disability, whether by injury or by disease. *Ib.*
8. Construction within ten miles of other road being constructed, not enjoined. *Macon & A. R. Co. v. M. & D. R. Co.* 83.  
"Now constructed" and "already constructed" in general law of incorporation, refer to roads constructed before the enactment. *Ib.*
9. Tracks on streets of city enjoined for citizen alleging special damage to his real estate. *Sav. & W. R. Co. v. Woodruff*, 94.  
Authority for laying, not derived from popular vote nearly thirty years before, under special statute. *Ib.*
10. Live-stock killed by falling into trestle when obstinately running ahead of train, gives no action. *Gay v. Wadley*, 103.
11. Fire caused by sparks from locomotive, recovery sustained. *Port Royal R. Co. v. Griffin*, 172.  
Spark-arresters and fire-boxes alleged wanting. *Ib.*
12. Crossing obstructed by standing cars, unauthorized; but gives no recovery for injury by climbing between cars, unless. *Andrews v. R. Co.* 192.  
Going round to unusual place to cross, diligence incumbent on company's servants. *Sav. R. Co. v. Smith*, 230.
13. Carrier of freight liable for goods negligently held two days after arrival (though called for) and then destroyed by flood. *Richmond & D. R. Co. v. Benson*, 203.  
Conversion by failure to deliver on demand. *Ib.*  
Marks on freight corresponding to those on bill of lading containing name of consignee, carrier not excused. *Ib.*
14. Bill of lading admitted without special proof of its execution or of the signer's agency. *Ib.*
15. Carrier of live-stock, liability of, for keeping horses on cars over 28 hours without unloading for rest, food etc. *Nashville R. Co. v. Heggie*, 210.

- Fire in stock-yards at feeding station, no excuse. *Ib.*  
Owner's agent deficient in urging carrier's servant to stop for unloading, immaterial. *Ib.*
16. Brakeman stepping on clinker of unusual size on margin of track, company not liable for injury. *Lee v. Central R. Co.* 231.
17. Carrier not compelled to contract to forward cotton beyond its own terminus. *Coles v. Central R. Co.* 251.  
Refusal to issue through bills of lading, followed by refusal to deliver cars to connecting carrier, gives no action for damages or penalty. *Ib.*  
Through contract made, failure to carry it out gives action. *Ib.*
18. Servant injured by flake knocked from swage in average condition, no recovery. *McNally v. R. Co.* 262.
19. Accidental injury. *Ib.*; *Lee v. R. Co.* 231; *East Tenn. Co. v. Sudeth*, 388.
20. Rule governing conduct of servant as such, binding, when. *Ga. P. R. Co. v. Dooley*, 294.  
Requiring waiver of rights unconnected with duty, not binding without express agreement. *Ib.*
21. Road-beds of other railroads not compared with that of defendant. *Ib.*  
Defective, cross-ties rotten, liability for injury from. *Ib.*
22. Battery by conductor on street-car passenger, first on car, then at office, liability for. *Sav. R. Co. v. Bryan*, 312.
23. Crossings, injuries at, without complying with statute, negligent. *Woodruff v. R. Co.* 318; *Chat. R. Co. v. Jackson*, 677.
24. Servant injured in workshop, blameless; liability for negligence of fellow-servant. *Ga. R. Co. v. Brown*, 322.
25. Passenger's trunk, delivery of, to agent of company, or to him as agent for passenger; liability for loss. *Ga. R. Co. v. Thompson*, 327.
26. Crossing, injury to wagon and mules at, by running cars illegally. *East Tenn. R. Co. v. Wurmack*, 351.
27. Servant's lamp extinguished while making usual signal with it, no presumption of negligence from. *East Tenn. Co. v. Sudeth*, 388.  
Falling from ore-car, no presumption of improper loading. *Ib.*
28. Passenger from flag-station, without ticket, agreement with conductor as to fare. *Ga. R. Co. v. Murden*, 434.  
Not charged with knowledge of rules governing conductor. *Ib.*  
Agency of conductor. *Ib.* See 32, 35, below.
29. Stock-gap removed, exposing crops, value of fencing not yet built not recovered. *Chat. R. Co. v. McLendon*, 517.  
Malice in removal not considered in action on contract. *Ib.*

30. Coupling cars, draw-bar for, whether defective. *Ousley v. R. Co.* 538.
31. Servant killed, charge grouping facts showing negligence of, must leave question to jury. *Central R. Co. v. Hubbard*, 624.  
Declaration held sufficient; but variance in doubtful case for recovery will set aside verdict. *Ib.*  
Presumption of negligence arises in all cases. *Ib.*
32. Passenger expelled by negligent mistake of conductor as to ticket. *Ga. R. Co. v. Eskew*, 641. See 35 below.  
Need not wait for forcible expulsion. *Ib.*  
Intention of conductor in giving order, how shown. *Ib.*
33. Misnomer of, corrected by amendment. *Chat. R. Co. v. Jackson*, 676.
34. Carrier's liability for non-delivery in reasonable time, with through contract beyond its terminus, and without it. *Central R. Co. v. Skellie*, 686.  
Agent's admissions after failure to ship, but transaction still in progress, admissible. *Ib.*
35. Passenger expelled at night because of wrong ticket; liability for mistake of agent. *Ga. C. Co. v. Dougherty*, 744.  
Mistake discoverable by looking at ticket, no relief to company. *Ib.*
36. Walking on track, aged deaf man killed, his negligence barred recovery. *Seats v. R. Co.* 811.

#### RATIFICATION.

1. By plaintiff having legal title, of suit brought by usee, during its pendency, relates to commencement. *Bowe v. Gress*, 17.
2. Of agent's interposition of illegality, by appeal to superior court. *Cook v. Buchanan*, 763.

#### RECEIVERS. See *Equity*, 2; *Injunction and Receiver*.

1. Assignees, rights of, acquired by. *Hill v. Bank*, 284.
2. Suits by, against transferees of effects of insolvent bank, authorized by order here. *Ib.*

#### RECOGNIZANCE. See *Bonds*, 3.

#### RECORD. See *Liens*, 1, 4.

#### RECOUPMENT. See *Distress Warrant*, 5.

#### REDEMPTION. See *Title*, 1, 3, 6, 17.

#### REINSTATEMENT. See *Nonsuit*, 2.

#### REMAINDERS. See *Estates*, 2, 4, 5, 7.

#### RESCISSION. See *Contracts*, 13, 16; *Partnership*, 7.

REVOCATION. See *Mortgages*, 7.

SALES. See *Levy and Sale*; *Promissory Notes*, 1.

1. Order for, void for no jurisdiction, on application of life-tenant as trustee. *Taylor v. Kemp*, 181.
2. Void, under mortgage foreclosure, purchaser subrogated to rights of mortgagee. *Dutcher v. Hobby*, 198.  
*Caveat emptor* not applied. *Ib.*
3. Broker's memorandum of, insufficient if it refer to additional terms left in parol. *Lester v. Heidi*, 226.
4. Parol, of oxen, on condition; judgment against vendee subjects property. *Mann v. Thompson*, 347.
5. Absolute, or with privilege to return goods. *Newburger v. Hoyt*, 508.
6. Partner's written transfer of goods, and assignment of contracts to secure creditor, instrument was, and not bill of sale. *Phillips v. Trowbridge Co.* 699.
7. Power of, in mortgage, revoked by death. *Wilkins v. McGehee*, 764.
8. Estoppel from contesting validity of, none by presence and silence. *Ib.*
9. Executrix's, to pay debts, under previous order, cuts off mortgage of devisee on his interest. *Myers v. Pierce*, 786.

SCHOOLS.

1. Election authorizing tax for, in town, acquiescence in, bars restraint of collection, when. *Irvin v. Gregory*, 605.
2. Municipal, non-resident pupils admitted to, but not to the exclusion of any resident, or at less rate than tax rate for each resident. *Ib.*  
Incidental fee not chargeable to residents, when. *Ib.*
3. Statute authorizing, given effect, though legislative and popular intent in unconstitutional provision fail. *Ib.*
4. Board of education, wrong acts of, no cause for enjoining tax. *Ib.*

SERVICE. See *Practice in Supreme Court*, 20.

1. Order to perfect, granted at second term, where sheriff misled plaintiff's counsel, in discretion of judge. *Allen v. Mutual Co* 74.
2. Extension of time for, not imported by entries of continuance on bench-docket. *Peck v. LaRoche*, 314.
3. Process, standing alone, does not authorize, after appearance term; and acquiescence not implied if motion to dismiss promptly made at first term after. *Ib.*



4. Non-resident of county not bound by service by constable, when. *Wade v. Wisenant*, 484.
5. Appearance and demurrer waived question of. *Lyons v. Bank*, 485.
6. Acknowledgment of, by counsel, waives mistake in name of defendant corporation, when. *Chat. R. Co. v. Jackson*, 676.

SET-OFF. See *Distress Warrant*, 4.

SHERIFFS. See *Levy and Sale*, 1, 4.

1. Custody and possession of heavy machine must be maintained; liability for loss by want of due care and diligence. *O'Pry v. Kennedy*, 662.
2. Rule against, answer traversed, verdict concludes objections proper for demurrer and defences that might have been set up. *Ib.*

SLANDER. See *Libel and Slander*.

STABBING. See *Criminal Law*, 1, 11.

#### STARE DECISIS

Statutory construction fifteen years ago without legislative change. *Ga. R. Co. v. Brown*, 322.

Erroneous, five years old, not upheld without weighty reasons in behalf of public policy. *City v. Church*, 732.

STATUTES. See *Code Sections; Frauds, Statute of; Limitations*.

1. Railroad incorporation law construed: "now constructed" and "already constructed" in code, §1689(t), refer to roads constructed before the act. *M. & A. R. Co. v. M. & D. R. Co.* 83.
2. *A veritas legis non est recedendum*, applied. *Ib.*
3. Words of, given their plain and unambiguous meaning. *Ib.*
4. Election under special act nearly thirty years ago for laying railroad tracks in city streets, and tracks laid, additional side-tracks or turnouts not authorized. *Sav. & W. R. Co. v. Woodruff*, 94.  
Power conferred by act exhausted. *Ib.*
5. Railroad connection in title; side-tracks, turnouts and sheds in body treated as part of scheme of connection. *Ib.*
6. Telegraph penalty act of 1887 not repealed by act of 1889. *Western U. Tel. Co. v. Cooledge*, 104.  
Act of 1889 seems to contemplate more than one subject-matter; and applies only to companies constructing lines after its passage. *Ib.*
7. Superior courts in two sections, acts providing for, constitutional. *Bone v. State*, 108.

8. Carrier not compelled by act of 1871 (Code, §719q), as amended by act of 1883, to furnish its own cars for through shipment. *Coles v. Central R. Co.* 254.  
Power of legislature to compel making of through contract, doubted. *Ib.*
9. Bank insolvent cannot prefer, under act of 1833 (Code, §4429), as other debtors under act of 1818. *Hill v. Bank*, 284.
10. Assessment for street-paving authorized by, as well as affidavit of illegality; construed. *Bacon v. Mayor*, 302.
11. *Expressio unius est exclusio alterius*, applied. *Crawford v. Glasgow*, 351.
12. Year's support, part of statute of distributions. *Phelps v. Daniel*, 366.
13. Election, advertisement provisions in law authorizing, are mandatory; but one omission treated as mere irregularity, when. *Irvin v. Gregory*, 605.
14. Schools in town authorized by, unconstitutional provision will not vitiate whole, but effect given to, how. *Ib.*
15. Unconstitutionality of one provision not affecting main purpose, effect given, applicable to laws submitted to the people. *Ib.*
16. Street improvement assessments, local laws authorizing, construed. *Bacon v. Mayor*, 301; *City v. Church*, 730.
17. Directory provision for attaching unsigned receipt to tax-execution. *Wilson v. Herrington*, 777.

STOCK-LAW. See *Elections*, 5.

#### STREETS.

1. Railroad side-tracks and turnouts in, not allowed without statutory authority. *Sav. & W. R. Co. v. Woodruff*, 96.  
Authority exercised under popular vote, power exhausted; second election nearly thirty years after, gave no power. *Ib.*
2. Assessment for paving, statute authorizing, authorized affidavit of illegality to execution. *Bacon v. Mayor*, 301.  
Two sections of same street, each treated as a street. *Ib.*  
Work and materials comprehended by statute. *Ib.*  
Material not necessarily specified in ordinance. *Ib.*  
Railroads in broad street not necessarily paved, though abutting realty assessed. But *mandamus* might lie to compel city-council to have railroads paved, when. *Ib.*  
Ministerial acts, legality and accuracy of, open to question on general affidavit of illegality. *Ib.*  
Frontage alone considered, without reference to depth, superficial area or value of realty. *Ib.*  
Intersecting streets treated just as abutting realty with city as owner. *Ib.*

Intervening space between two paved tracks on same street, not chargeable to city. *Ib.*

Abutment of street on realty makes the realty abut on the street. *Ib.*

Newspaper advertising sale under execution need not be the one advertising sheriff's sales. *Ib.*

Constitutionality of, decided. *Ib.*

Churches not exempt. *City v. Church*, 730.

Public property impliedly exempt. *Ib.*

3. Obstruction of, by permanent fish-box, no power in city to allow, without statute. *Laing v. Mayor*, 756.

Removed summarily in Americus. *Ib.*

License as fish-dealer gave no vested right to keep box in street. *Ib.*

SUBROGATION. See *Mortgages*, 2.

TAXATION. See *Executions*, 1, 3, 4, 5. *Municipal Corporations*, 4; *Streets*, 2; *Title*, 1, 6, 7, 16, 17.

1. Injunction to restrain enforcement of, on Augusta canal, as public property. *Magruder v. City Council*, 220.
2. Futures, buying or selling of, by agent of New York firm, without registry and payment for license, penalty. *Alexander v. State*, 246.

TELEGRAPH COMPANIES.

1. Penalty statute of 1887 not repealed by act of 1889. *Western U. Tel. Co. v. Cooledge*, 104.  
Claim for damages to be made in sixty days, not applied to suit under. *Ib.*
2. Act of 1889, to encourage construction of lines, etc., applies only to lines constructed after its passage. *Ib.*  
Violative of constitution in having more than one subject-matter, *semble*. *Ib.*
3. Penalty, suit for, barred in one year from when. *Western U. Tel. Co. v. Nunnally*, 503.

TENANTS IN COMMON. See *Ejectment*, 5.

TENDER. See *Ejectment*, 6.

TITLE. See *Notice*, 1, 2; *Vendor and Purchaser*.

1. Tax levy and sale against trustee not under written appointment, purchaser acquired what. *Mundell v. Fulcher*, 166.  
Redemption by trust beneficiary. *Ib.*
2. Prescriptive, none against remaindermen attaining majority less than seven years before suit brought on death of life-tenant. *Taylor v. Kemp*, 181.

3. Redemption of, by administrator (husband) of debtor, in action seeking also to conclude co-heir. *Williams v. Wheaton*, 223.
  4. Assignment by insolvent bank passed what, to assignees. *Hill v. Bank*, 284.
  5. Wife recognizing husband's, by taking mortgage, effect on her subsequent claim. *Silvey v. Chamblee*, 333.
  6. Redemption from tax sale, year of, runs from date of sale, not from record of deed. *Boyd v. Wilson*, 379.
  7. Tax, protected equally with such as depends on judgment. *Ib.*
  8. Gift, deed of, destroyed by donor (father) after donee's (son's) death, could not divest. *Watts v. Starr*, 395.
  9. Death of devisee did not terminate his title to dividends of stock, when. *Cleghorn v. Scott*, 496.
  10. Color of, and claim of right, for seven years before action, prevents receiver for mesne profits for insolvent. *Davis v. Taylor*, 506.
  11. Cropper had none until master (tenant) was paid his part and advances; renter from tenant had. *Bryant v. Pugh*, 528.
  12. Sale for year's support illegal, left title in children. *Milner v. Vandiver*, 540.
  13. Insurance policy not transferable by mere delivery, or by written power to collect with oral direction to apply proceeds. *Greenwood v. Boyd*, 582.
  14. Grant conditional not complied with, holder had no right. *Ga. R. Co. v. Macon*, 588.
  15. Homestead sold under judgment on attachment against former beneficiary, passed none. *Burns v. Lewis*, 591.
  16. Color of, and claim of right, with possession, make possessor subject to assessment for taxes. *Ib.*
  17. Taxes paid or property redeemed by one subject to assessment purchasing from purchaser at tax sale against former occupant. *Ib.*
  18. Written, given by partner, to goods, with assignment of contracts, to secure debt; and cancelled. *Phillips v. Trowbridge*, 699.
  19. Possession of decedent under *bona fide* claim, *prima facie* evidence of. *Wolfe v. Baxter*, 705.
  20. Mortgage gives no such interest in the thing as to render a power of sale therein irrevocable by death of mortgagor. *Wilkins v. McGehee*, 764.
- TORTS. See *Damages*; *Libel and Slander*; *Malicious Arrest*; *Malicious Suit*; *Negligence*; *Pleadings*, 8; *Railroads*.
- TRADERS. See *Debtor and Creditor*, 4, 5.

TRANSFERS. See *Executions*, 1.

TRIALS. See *Practice in Superior Court*.

TROVER. See *Railroads*, 13.

1. Dismissal of action voluntarily gives judgment for restitution, and is breach of plaintiff's bond. *Clark v. Lee*, 30.
2. Malicious suit in, defendant may have attorney's fees for defending. *Farrar v. Brackett*, 463.
3. Rent, highest, lowest or any intermediate amount of, charged to plaintiff in, by verdict for defendant, when. *Ib.*  
Amount earned by mill when leased illustrates. *McCaula v. Murphy*, 476.  
Recoverable by party illegally deprived of property. *Ib.*
4. Tenant's recovery in, of landlord, for crops sold him by cropper, not by sub-tenant. *Bryant v. Pugh*, 525.

TRUSTS. See *Principal and Agent*, 2, 3.

1. Constructive, on vendee of two parcels of land, paying for but one and inducing vendor to convey both in one deed, by fraudulent oral promise. *Brown v. Doane*, 32.
2. Tax sale against trustee not appointed in writing. *Mandell v. Fulcher*, 166.
3. Life-tenant not made trustee, sale by him as such, though by order, void. *Taylor v. Kemp*, 181.
4. Creditor of wife holds land conveyed as security, in trust for husband, when. *Williams v. Wheaton*, 224.
5. Bank insolvent, transferees of effects of, subject to suit by receivers. *Hill v. Bank*, 234.  
Assignees of, accepting trust, acquired what. *Ib.*
6. Attorney's use of information of husband to purchase execution against wife for self, makes trust attach. *Larey v. Baker*, 438.
7. Attachment for non-residence of owner, estate not subject to. *Burns v. Lewis*, 591.
8. Children born subsequently to deed to A as trustee for B and her children, took no interest. *Baird v. Brookin*, 709.
9. Executed at once, by deed to husband, trustee for wife, in 1881; property paid for with his money. *Payton*, 773.

VENDOR AND PURCHASER.

1. Price of land not reduced on account of location of boundary, without fraud or mutual mistake. *Silvey v. McCool*, 1.
2. Mistake pleaded, difference in value may be shown. *Ib.*  
Difference not appearing, no reduction. *Ib.*

3. Fraudulent oral promise of vendee of two parcels of land in one deed, he paying for but one, fixes trust on him for his fraudulent oral promise to vendor. *Brown v. Doane*, 32.
4. Ambiguous written undertaking to pay for land on procurement by vendor of complete chain of paper title, explainable by parol. *Ib.*  
Duty of vendor as to obtaining such title. *Ib.*
5. Parol sale on condition, of oxen, contract not reduced to writing, property subject to judgment against vendee. *Mann v. Thompson*, 347.
6. Unrecorded conveyance of growing crop defeated by judgment. *Green v. Franklin*, 360.
7. Transfer without recourse of notes for mill paid them, and title to mill passed to maker. *Farrar v. Brackett*, 464.
8. Return of goods unsold after four months, what is reasonable time for. *Newburger v. Hoyt*, 508.  
Option of, not exercised, title remains in buyer. *Ib.*
9. Rescission of land trade for fraud by failure of title of part, not prevented by offer to convey other land of same kind. *Bell v. Hutchings*, 562.

## VERDICT.

1. Required by evidence. *Clark v. Fee*, 9.
2. Treated as correct by Supreme Court where brief of evidence blends both material and immaterial. *Bowe v. Gress*, 19.
3. Cures defect of form not amended. *Ib.*  
Errors in charge, and in admission of testimony. *Mandell v. Fulcher*, 167; *East Tenn. R. Co. v. Warmack*, 351; *Bryant v. Pugh*, 530; *Ga. R. Co. v. Macon*, 586.
4. Damages not excessive. *Ga. P. R. Co. v. Bowers*, 22; *R. & D. R. Co. v. Childress*, 85; *Sav. R. Co. v. Smith*, 229; *Ga. P. R. Co. v. Dooley*, 295; *Sav. R. Co. v. Bryan*, 312; *Ocean S. Co. v. Matthews*, 418; *Ga. R. Co. v. Dougherty*, 744.  
*Aliter*: *Ga. R. Co. v. Eskew*, 641.
5. Assault to murder, required. *Patterson v. State*, 70.
6. Evidence conflicting, not disturbed. *R. & D. R. Co. v. Davis*, 76; *R. & D. R. Co. v. Childress*, 85; *Davis v. Jackson*, 138; *Port Royal R. Co. v. Griffin*, 172; *Sav. R. Co. v. Bryan*, 312; *Ga. R. Co. v. Brown*, 320; *Ga. R. Co. v. Thompson*, 327; *Crauford v. Ryals*, 349; *McCaulh v. Murphy*, 476; *Sutherland v. State*, 515; *Hagerstown Co. v. Grizzard*, 574; *Freeman v. Coleman*, 590; *Howland v. Bartlett*, 669; *Matthews v. State*, 782; *Hooks v. Hays*, 797.
7. Law and evidence, warranted by. *R. & D. R. Co. v. Childress*, 85; *Sav. R. Co. v. Smith*, 229; *Joiner v. Ocean S. Co.* 248; *East T. R. Co. v. Warmack*, 351; *Statham v. Shellnut*, 371; *Ocean S. Co. v. Matthews*, 418; *Sharpton v. Johnson*, 443; *Matthews v. State*, 804.

8. Murder, verdict required. *Bone v. State*, 108.
  9. Stabbing, verdict authorized. *Francis v. State*, 123.
  10. Correct, not set aside for error in charge. *Mandell v. Fulcher*, 167.
  11. Credit given in, presumed, when. *McElmurray v. Turner*, 215.
  12. Third, upheld if evidence for prevailing party warrants. *Sav. R. Co. v. Smith*, 229.
  13. Special questions not all answered in, new trial granted. *Cooper v. Branch*, 234. See 17 below.
  14. Former, in same case, should be kept from jury on request. *Ga. P. R. Co. v. Dooley*, 295.
  15. Burglary and larceny from house both charged, finding of guilty convicts of burglary. *Farborough v. State*, 396.
  16. Felony found under indictment for misdemeanor only, judgment arrested. *Allen v. State*, 399.
  17. Issue not covered by, jury sent back, *Vance v. Roberts*, 458.
  18. Uncertainty in, surplus words do not make, when. *North R. Co. v. Crayton*, 499.  
Not determined, if not in record. *Jones v. Eubanks*, 616.
  19. Divorce, finding of second jury, effect of, though no judgment entered. *Burns v. Lewis*, 591.
  20. Set aside for variance of proof from allegations. *Central R. Co. v. Hubbard*, 624.
  21. Concludes defence that might have been set up before, when. *O'Pry v. Kennedy*, 663.
  22. Directed by court. *Taylor v. Kemp*, 182; *Laing v. Mayor*, 756.
- WAIVER. See *Arbitration and Award*, 1; *Criminal Law*, 18; *Jurisdiction*, 3, 4; *Practice in Superior Court*, 17, 20, 26, 31; *Service*, 3, 5, 6.

#### WILLS.

1. Life-estate devised here. *Taylor v. Kemp*, 181.
2. Marriage of woman revokes, if containing no provision in contemplation of marriage. *Ellis v. Darden*, 368.  
Contemplation not shown by parol. *Ib.*  
Act of 1863 and constitution of 1868 did not modify. *Ib.*
3. Revocation of women's, and of men's. *Ib.*
4. Construed; items disposing of railroad stock and dividends. *Cleghorn v. Scott*, 496.
5. Life-estate with remainder, here devised. *Fleming v. Ray*, 533.
6. Antenuptial agreement for payment to wife by husband's executors on his death, not testamentary. *Huguley v. Lanier*, 625.
7. Contract to make, enforceable. *Ib.*

WITNESS. See *Criminal Law*, 22.

1. Absent, and no continuance asked, no new trial granted. *Crawford v. R. Co.* 5.
2. Misunderstood, no ground for new trial when. *Ib.*
3. Mistake by, that could have been prevented. *Ib.*
4. Expert, as to sound railroad material, not indispensable, when. *Ib.*
5. Non-expert's opinion from circumstances of stabbing not admissible. *Patterson v. State*, 70.
6. Character of, no evidence as to, charge on, irrelevant. *Chat. Co. v. Sullivan*, 50.  
Personal knowledge of jurors; whether previous decisions are sound, query. *Ib.*
7. Under rule, but hearing testimony or prisoner's statement, may be allowed to testify. *Bone v. State*, 108.
8. Disregard testimony of, jury may, when. *Port Royal R. Co. v. Griffin*, 173.
9. Subscribing, to contract, must be produced, or his signature proved. *Hudson v. Puett*, 341.
10. Impeachment of, declarations used for, not treated as substantive evidence. *Watts v. Starr*, 392.
11. Question of law not answered by. *McCaulla v. Murphy*, 476.
12. Impeachment by party introducing, by evidence of previous declarations, not allowed, unless entrapped, applies to State on criminal trial. *Dixon v. State*, 754.
13. Deed, delivery or non-delivery of, defendant in ejectment not competent to testify, when; maker, not a party, was competent, how. *Harrison v. Perry*, 813.

#### WORDS AND PHRASES.

1. Railroad "now constructed" or "already constructed" in statute, means constructed when the act was passed. *Macon & A. C. Co. v. M. & D. C. Co.* 83.
2. "Effects," money, notes or other securities included in. *Hill v. Bank*, 284.
3. Advertisement; "time, place and manner of sale" in code, §3856(8), do not embrace newspaper. *Bacon v. Mayor*, 303.
4. "Donations" not treated as advancements, when. *Langford v. Nabers*, 454.
5. "Horse" defined; description required of indictment for stealing. *Brown v. State*, 633.
6. "Party" in code, §3854, whether to case or to contract. *Harrison v. Perry*, 816.



## YEAR'S SUPPORT.

1. Appeal lies from judgment of ordinary on objections to return of appraisers for. *Phelps v. Daniel*, 363.
2. Married woman's estate, not set apart from, for minor child, husband and father also surviving. *Ib.*  
Poverty and disability of husband make no exception. *Ib.*
3. Statute of distributions, law as to, part of. *Ib.*
4. Creditor not excluded by claim for, under act of 1871. *Ib.*
5. Sale for, by mother, whether authorized; defence to ejectment *Milner v. Vandivere*, 540.

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